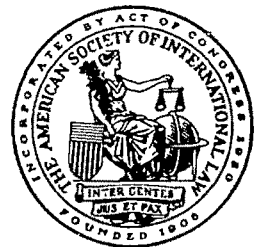
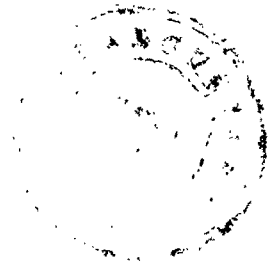


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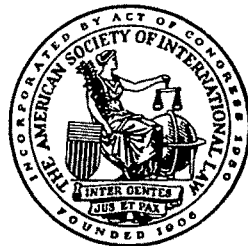
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THIRD-PARTY INTERVENTION BEFORE THE INTERNATIONAL COURT OF JUSTICE

By C. M. Chinkin*

INTRODUCTION

Until lately, the procedure of third-party intervention before the International Court of Justice provided for by Articles 62 and 63 of the Statute of the Court had been underutilized;¹ as a result, there was scant judicial authority and comparatively little academic discussion² on its use and limitations. This situation has now dramatically changed, as three recent cases before the Court have involved claims of third-party intervention: that between Tunisia and Libya,³ where Malta made the request to intervene; that between Libya and Malta,⁴ where Italy was the requesting state; and, most recently, the case between Nicaragua and the United States,⁵ where El Salvador made a declaration of intervention.

The Court has thus been given ample opportunity to dispel the doubts and uncertainties that have surrounded the procedure of intervention for so long, and to do so in the context of actual litigation, in accordance with the decision taken over 60 years ago to resolve matters as they arose.⁶ The circumstances are especially opportune because the first two cases involved requests for intervention under Article 62, while the third was a declaration

* Senior Lecturer in Law, University of Sydney. The author wishes to thank Professor James Crawford for his many helpful comments on a first draft of this article, which was presented to the International Law Interest Group at the 1985 AULSA Conference in August 1985.

¹ The only cases involving intervention were: *S.S. Wimbledon* (UK, Fr., Italy & Japan v. Ger.), 1923 PCIJ, ser. A, No. 1 (Judgment of June 28) (Poland intervening); *Haya de la Torre* (Colom. v. Peru), 1951 ICJ REP. 71 (Judgment of June 13) (Cuba intervening); *Nuclear Tests* (Austl. v. Fr.; NZ v. Fr.), Application to Intervene, 1973 ICJ REP. 320 (Orders of July 12) (Fiji requesting intervention). There have been dicta in other cases that will be referred to where appropriate.

² Most general books on international law make reference to intervention, but more detailed studies have tended not to be in English. See, e.g., M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942*, at 419 (1943); S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* (1965) [hereinafter cited as *LAW AND PRACTICE*]; and more recently, S. ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT 173-78* (1983) [hereinafter cited as *PROCEDURE*]; Miller, *Intervention in Proceedings before the International Court of Justice*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 550 (L. Gross ed. 1976). Several articles have appeared since the recent cases before the ICJ and will be referred to below.

³ *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, 1981 ICJ REP. 3 (Judgment of Apr. 14) [hereinafter cited as *Malta*].

⁴ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, 1984 ICJ REP. 3 (Judgment of Mar. 21) [hereinafter cited as *Italy*].

⁵ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Order of Oct. 4) [hereinafter cited as *El Salvador*].

⁶ *Malta*, 1981 ICJ REP. at 14 (citing drafting history of Article 62).

of intervention under Article 63. The purpose of this paper is to examine the objects and scope of third-party intervention from various perspectives so as to attempt to assess its future applicability. Despite the opportunities presented to the Court, more issues continue unresolved than have been clarified.

The most obvious first comment is that in none of the three cases was intervention allowed—despite the fact that the Court avoided deciding upon the potential stumbling block of the need to prove a jurisdictional link between the would-be intervenor and the original parties to the dispute. The dominant question must therefore be whether the Court has interpreted Articles 62 and 63 so restrictively that there is little, if anything, remaining of the supposed procedure; and if this is indeed the conclusion, whether it is justified by policy or the Statute. I do not intend to work systematically through the judgments and the separate and dissenting opinions in these three cases, or in the earlier ones where intervention was at least referred to; rather, I shall try to analyze the various claims contextually so as to emphasize the differing purposes underlying them, the available strategies for the states concerned and the responses of the Court to these different situations. Considerable differences in these relevant factors are already emerging and their recognition might assist states in predicting whether a claim for intervention is a worthwhile strategy and its chances for success.

THE LEGAL BASIS FOR INTERVENTION

The legal basis for intervention in contentious cases rests on Articles 62 and 63 of the Statute of the Court, as supplemented by Articles 81–85 of the 1978 Rules of the Court. The Statute distinguishes between what has been termed “discretionary intervention” (Article 62⁷) and “intervention as of right” (Article 63⁸), both labels of doubtful accuracy. The former allows a state that believes it has an interest of a legal nature that may be affected by the Court’s decision in a case between two or more other parties to request permission to intervene in those proceedings, which request will be considered by the Court.

The express wording of Article 62 is thus not restrictive. It is phrased subjectively and the only requirement is that the state must feel that its interests might be affected. “Interest” is not defined other than that it is of a legal nature; it is not specified whether the interest need be direct, whether it need be substantial or even whether it need be personal to the state.⁹ The

⁷ Article 62 states: “1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request.”

⁸ Article 63 states:

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

⁹ See submissions of P. Lalive, counsel for Malta, in oral argument, ICJ Doc. CR 81/2 (Mar. 19).

state must apprehend that its rights will be affected by the "decision" in the original proceedings, another undefined word that presumably excludes the full hearings, and even, arguably, the reasoning in the case. "Decision" is also used in Article 59 to state the binding nature of the proceedings between the parties,¹⁰ so there is an obvious overlap between the two articles. Article 62 does not expressly require a jurisdictional link between the would-be intervenor and the original parties, and it is located in chapter 3 on procedure, not chapter 2 on competence. Moreover, there is no cross-reference between Article 62 and Article 36 on jurisdiction, as there is, for example, in Article 53.¹¹

Article 62 appeared in identical terms in the Statute of the Permanent Court except for the inclusion of the words "as a third party" after "to be permitted to intervene" in the English text. The recent cases devoted some attention to the significance of this omission.¹² Although the text of the article underwent only this slight modification in 1945, the Rules have been changed a few times; the present version specifies far more precisely than previously the form and content of a request to intervene.¹³ It may be asked whether the Rules merely state the form of a request, or whether they impose additional substantive restrictions on intervention. If the latter view is accepted, it raises the theoretical question whether a formal treaty in force between states can be modified by the Rules, which are drafted and adopted by the Court itself, a question that must surely be answered in the negative.

Article 63 deals with a totally different situation. Apart from the fact that both articles allow some form of intervention, there is little justification for treating them together and doing so may well conceal the differences. Article 63 provides for intervention as of right by other parties to a convention whose construction is in issue before the Court. Article 62 lacks an equivalent provision to that in Article 63 making an intervening state bound by any part of the decision, though the intervenor presumably will be so bound if it is labeled a party to the proceedings in the terms of Article 59, a point

¹⁰ Article 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

¹¹ A point made by Elias in the chapter on intervention in T. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 89 (1983). Elias is only one of several judges of the ICJ (former or present) to have written on intervention. In *VÖLKERRECHT ALS RECHTSORDNUNG—INTERNATIONALE GERICHTSBARKEIT—MENSCHENRECHTE: FESTSCHRIFT FÜR HERMANN MOSLER* (1983), there are also articles by Judges Jiménez de Aréchaga and Oda, both of whom wrote extensive opinions in the cases discussed. See also Jessup, *Intervention in the International Court*, 75 *AJIL* 903 (1981).

¹² See, e.g., Malta, 1981 *ICJ REP.* at 14, 24 (Oda, J., sep. op.); Italy, 1984 *ICJ REP.* at 27.

¹³ Article 81, paragraph 2 states that the application shall set out:

- (a) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;
- (b) the precise object of the intervention;
- (c) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.

that will be considered below. Article 63 had previously been assumed to confer a right of intervention, provided the preconditions were met, but the decision on El Salvador's application must cast doubt upon this assertion.¹⁴

An unanswered question is whether Articles 62 and 63 are mutually exclusive or whether a state may make both a request for intervention and a declaration in respect of the same contentious proceedings. Circumstances can be envisaged where the construction of a convention is in issue, but where the same state also feels it has an interest falling outside the terms of the convention that may be affected. In the *S.S. Wimbledon*,¹⁵ Poland requested intervention under Article 62 on the basis of its legal interest in the cargo of the vessel, which was destined for Poland; but it referred to Article 380 of the Treaty of Versailles. The British Agent suggested that the intervention therefore belonged more properly under Article 63, and the suggestion was accepted. Since the two forms of intervention are different and applicable to different situations, there seems to be no reason why a state cannot use them simultaneously.

In the *Haya de la Torre* case, the Court identified intervention as "incidental to proceedings in a case."¹⁶ The nature of incidental proceedings deserves far wider discussion than is possible here, but various consequences appear to flow from this characterization.¹⁷ First, proceedings must actually be in progress: when the Court found that there was no longer a dispute between Australia and New Zealand on the one hand, and France on the other, there no longer remained any legal basis for Fiji's request for intervention.¹⁸ Moreover, the subject matter of the proposed intervention must bear a sufficiently close connection to the proceedings for intervention to be permissible and the competence of the Court to consider the request for intervention may be based on this nexus, not the normally applicable principle of consent, a conclusion that has been strongly resisted by a number of judges.¹⁹

The International Court is not the only international adjudicative arena that provides for intervention. The Statute of the Permanent Court of Arbitration²⁰ contains the forerunner of Article 63, but no equivalent of Article 62. Indeed, the perceived need for intervention in situations other than those involving conventional construction was the purpose of introducing the wholly new concept of Article 62 into international law.

¹⁴ In the Order on the Declaration of Intervention of El Salvador, 1984 ICJ REP. 215, the Court held by 14 to 1 that the Declaration was inadmissible. Miller states that declarations of intervention are treated "as though they were applications for permission to intervene." Miller, *supra* note 2, at 552.

¹⁵ 1923 PCIJ, ser. A, No. 1.

¹⁶ 1951 ICJ REP. at 76. This characterization has been much relied on in subsequent cases.

¹⁷ S. ROSENNE, *LAW AND PRACTICE*, *supra* note 2, at 422. Other incidental proceedings include indication of interim measures and revision of judgments.

¹⁸ *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, Application to Intervene, 1974 ICJ REP. 530, 535 (Orders of Dec. 20).

¹⁹ See, e.g., Separate Opinion of Judge Morozov in *Malta*, 1981 ICJ REP. at 22; and Separate Individual Declarations by Judges Onyeama and Jiménez de Aréchaga in *Nuclear Tests*, 1974 ICJ REP. at 532, 533.

²⁰ Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, TS No. 392; as revised Oct. 18, 1907, 36 Stat. 2199, TS No. 536.

Articles 36 and 37 of the General Act for the Pacific Settlement of International Disputes of 1928 provide for intervention in language analogous to that of Articles 62 and 63; more topically, Articles 31 and 32 of the Statute of the International Tribunal of the Law of the Sea²¹ are closely modeled on them. Furthermore, Article 37 of the Protocol to the Statute of the Court of Justice of the European Communities²² allows for intervention by member states, institutions and other persons in cases before the Court. While the jurisdictional basis of the European Court stands in marked contrast to that of the International Court, it is nevertheless valuable to have regard to the European experience. The latter was recently expanded by the amendment of the procedures of the European Court of Human Rights.²³ The President may grant leave to a member state not a party to the proceedings to submit written comments in any case before the Court, even one originating in an individual application to the Commission under Article 25.²⁴ Thus, a member state may in effect give its opinions in a case between a citizen of another state and that state's own government, a step far removed from traditional claims of "domestic jurisdiction." If the Law of the Sea Tribunal ever becomes a reality, the practice of the International Court will likely be given considerable weight there. The role of the Court in the future prescriptive process should not be overlooked.

POLICIES OF INTERVENTION

Although the Court has pointed out that it has no power to reject a request for intervention on overriding policy grounds,²⁵ it is evident and, indeed,

²¹ Ann. VI to the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5).

²² Article 37 states:

Member States and institutions of the Community may intervene in cases before the Court.

The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Community and between Member States and institutions of the Community.

Submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties.

Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, 298 UNTS 147.

²³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222. The Rules of the European Court of Human Rights were revised effective from Jan. 1, 1983. Rule 37(2) states:

The President may in the interest of the proper administration of justice invite or grant leave to any contracting State which is not a Party to the proceedings to submit written comments within a time limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person other than the applicant.

5 ECHR 312 (1983).

²⁴ Article 25 is an optional clause that only applies where the state party has specifically accepted the right of individual petition to the Commission. Cases can go on to the European Court of Human Rights in accordance with Articles 44-48 of the European Convention.

²⁵ Malta, 1981 ICJ REP. at 12.

frankly expressed in certain judgments²⁶ that underlying policies must be evaluated. The Court has described its role with respect to requests for intervention as one of deciding admissibility only; but the lack of clarity in such essential concepts as "interest," coupled with the determination by the Court that it must decide upon the proper purposes of intervention, makes forming value judgments inevitable. What, then, are the policies that can be identified as relevant to the process of intervention? Once ascertained, these may well be found to be conflicting. Consequently, their respective implications will have to be weighed so as to determine whether to favor a broad-based notion of intervention or, alternatively, one that operates within tight legal restrictions. The favored policies of the Court will affect the outcome of any such request and the different conclusions of the various judges will reflect their evaluations of the proper role of intervention in international litigation.

The conflicting policies on intervention in municipal law have recently been well expressed by American judges.²⁷ It appears that most municipal legal systems are extending the circumstances in which intervention may be allowed.²⁸ One often repeated policy—reiterated by certain judges of the International Court²⁹—justifying a flexible attitude towards intervention is to promote economy of litigation for the efficient administration of justice. Certainly, the inclusion of the procedure in the Court's Statute stems from the recognition that international disputes rarely, if ever, fit neatly into a bilateral pattern. Rather, because of the interdependence of international relations, events that culminate in international adjudication will affect different actors in different ways and with varying intensity. Where this impact is upon the legal interests of other states, principles of economy and efficiency may require that pertinent submissions be presented along with the main proceedings.

In sum, by allowing third-party intervention, the Court could avoid the possible duplication of proceedings. It could also gain a wider perspective on the entire series of actions culminating in the litigation than that presented by the original parties and thus be better informed about all aspects of the

²⁶ See, e.g., references to policy considerations by Judges Oda and Schwebel throughout their opinions in the three recent cases.

²⁷ For example:

On the one hand, there is the private suitor's interests in having his own lawsuit subject to no one else's direction or meddling. On the other hand, however, is the great public interest . . . of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process.

Atlantis Dev. Corp. v. United States, 379 F.2d 818, 824 (5th Cir. 1967) (Brown, J.). And, "[there are] two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending." *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (Bazelon, C.J.).

²⁸ See arguments of P. Lalive in Malta, ICJ Doc. CR 81/3, at 7 (Mar. 20), where he refers to the work of a consultant, Professor Habscheid, who concludes that there is a general tendency in modern procedural law to widen and liberalize intervention. Lalive cites in particular U.S. and French practice in support of this proposition.

²⁹ See, e.g., Italy, 1984 ICJ REP. at 35 (Mbaye, J., sep. op.); and *id.* at 90 (Oda, J., dissenting).

dispute. Finally, easier access to the international judicial arena and the increased participation in international adjudication that could be expected to result would promote the peaceful settlement of disputes, recognized as one of the fundamental norms of international law.

This enunciation of policy, however, presumes a similarity between municipal litigation and international litigation that might be thought not to exist. After all, international adjudication is just one of the methods for the peaceful settlement of disputes listed in Article 33 of the United Nations Charter,³⁰ and views may differ over the role of the Court. Despite the undeniable interaction of many actors in all aspects of international disputes, the Court may feel that it can best preserve its authority and act most effectively in cases presented to it within a bilateral framework. Where states have brought a dispute before the Court, especially through special agreement, which precludes a jurisdictional conflict, the Court may well determine that it can best serve the interests of the international community by adjudicating that dispute without allowing intervention, as that may lead the original parties to withdraw their acceptance of the Court's authority. Admittedly, this represents a limited view of the Court's role, but it may be a realistic one, allowing the Court to resolve specific disputes between states that will accept its ruling. If other interests are affected by its decision, they can be resolved at a subsequent time and, possibly, in another forum. The Court may not want to risk jeopardizing the successful resolution of the original dispute by widening its ambit through the overready acceptance of intervention.

This latter view of the Court's role is supported by the concept of party autonomy in international adjudication and necessarily entails restricting intervention. It recognizes that facilitating intervention could prove counterproductive by discouraging states from initiating a contentious suit for fear that they might be unable to control its course and eventual outcome if the dispute were widened beyond their direct concerns. It is also argued that third-party intervention runs counter to other fundamentals of international law such as the equality of states, consent and reciprocity in international adjudication.

These last policies are relevant to the question of how ready the Court should be to allow intervention. There are other considerations once intervention has been permitted. Intervention cannot be allowed to disrupt the proceedings by causing excessive delay and prolonging them, for this in itself would offend against the principle of economy. The Court can ensure against such consequences by enforcing the appropriate time limits and closely monitoring the proceedings. Parties must not be unduly disadvantaged by "unequal intervention,"³¹ where claims by an intervening state are

³⁰ The others are negotiation, inquiry, mediation, conciliation, arbitration and resort to regional arrangements.

³¹ Judge Schwebel's term, *Malta*, 1981 ICJ REP. at 35. He feels that, to some extent, an intervenor always has an inherent advantage in that the parties have set out their cases. Other disadvantages will emerge in the course of the discussion.

made after the original parties have committed themselves to a certain line of argument.

While remaining sensitive to these legitimate concerns of original parties and to its own position in the international dispute resolution process, the Court must not allow the interests of third states to be preempted or a procedure provided for by the Statute to fall into desuetude. States should not be permitted to negotiate bilateral special agreements for the commencement of proceedings with total disregard for the interests of third states, and intervention should not be perceived of as an unfriendly act.³² It is unrealistic and excessively formalistic to rely on Article 59 as the sole guarantee of third-party interests.³³ While this provision formally denies that a decision is binding on nonparties, in practice both the actual decision and the reasoning will have wider repercussions. They are likely to form the basis for predicting future behavior by all participants in both international and municipal decision making and to be used as bargaining factors in future negotiations. The likelihood that the Court will rely on its own jurisprudence in future litigation is high, which will place a heavy burden upon a state wishing to dissuade it from doing so.

When examining the Court's judgments on intervention, one should retain these identifiable and often conflicting policies as a point of reference; determining which are favored by the Court and which by individual judges will make the outcome of the application more understandable.

The matters just addressed relate primarily to the conflicting policies that arise under Article 62. Those under Article 63 are more explicit; since parties to a treaty are bound by it, all parties necessarily have an interest in its construction. The very nature of a multilateral convention enables a multiplicity of interests that may emerge in litigation. Again despite Article 59, a judicial interpretation of a treaty provision will clearly have considerable impact and be utilized by parties and nonparties. Parties to a convention whose construction is in issue should be given an opportunity to express their preferred interpretation to the Court before that body reaches its decision.

What is less clear in the modern context is why conventional law should be treated differently from customary law. Much customary law derives from multilateral treaties.³⁴ It therefore appears artificial to argue that if a convention is formally in force between states, they have the requisite interest under Article 63; while if it is not, although accepted as constituting customary international law, they have to rely upon the more restrictive provisions of Article 62. The two recent continental shelf cases illustrate this point. It is unlikely that the Court would rule upon the delimitation of any

³² See T. ELIAS, *supra* note 11, at 91-92.

³³ The Court in the *Libya/Malta* case stated that Article 59 adequately protected Italy's rights. Italy, 1984 ICJ REP. at 26. See also *id.* at 157 (Jennings, J., dissenting); *id.* at 103 (Oda, J., dissenting); and *id.* at 87 (Sette-Camara, J., dissenting).

³⁴ See North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, para. 71 (Judgment of Feb. 20).

continental shelf without reference to the United Nations Convention on the Law of the Sea,³⁵ a treaty that, of course, is not yet in force and so cannot be the basis of a claim under Article 63.³⁶ Even though all states have an interest in its interpretation and its impact upon the prescriptive process of international law, this general interest is not sufficient for a claim for intervention under Article 62.³⁷ This illogicality and inconsistency cannot be justified in view of the contemporary tendency to make international law by means of multilateral conventions and underlines the fact that Article 62 and Article 63 in reality pertain to very different situations.

Another major point of difference between the two articles and the assumptions that underlie them relates to the character of international adjudication and the nature of international disputes. Article 63 explicitly recognizes the possible interest of third states in what might be an essentially bilateral dispute through their treaty commitments. However, it is not only treaty participation that creates interests in other states; the interdependence of international affairs and the concern of all states in the development of norms of customary international law mean that many, if not all, disputes will have an impact upon states other than those directly involved. This is even true of boundary disputes between two states, as is illustrated by the *Tunisia/Libya* and *Libya/Malta* cases where Malta and Italy were genuinely concerned about the effect of the eventual boundaries upon their continental shelves, as well as interested in the enunciation of principles of international law governing boundary delimitation.

Yet adjudication is essentially a bilateral process that cannot easily take account of outside interests and, indeed, the Court has appeared to confine boundary issues to bilateral disputes. The wording of Article 62, with its requirement of an interest of a legal nature, and the restrictive interpretation the Court has given it serve to accentuate this point. It is regrettable that the potential plurality of interests in international disputes was incorporated directly into Article 63 by allowing a right of intervention where the construction of a common treaty is involved, but only indirectly in Article 62 where there is no more than a right to request intervention. However, since the decision on the El Salvador Declaration, this difference has been minimized, apparently in accordance with a desire to retain the bilateral nature of adjudicative proceedings despite the plurilateral nature of many disputes.

WHO MAY INTERVENE?

The short answer to this question is that only states may request intervention, in line with the rule that only states may be parties to contentious

³⁵ E.g., Article I of the Special Agreement between Tunisia and Libya, signed June 10, 1977, requested that the Court take account of "recent trends admitted at the Third Conference on the Law of the Sea." Quoted in *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ REP. 18, 21 (Judgment of Feb. 24).

³⁶ The use of the words "states . . . are parties" in Article 63 indicates that it must refer to a convention in force. See note 8 *supra*.

³⁷ *Malta*, 1981 ICJ REP. at 19.

proceedings before the International Court.³⁸ Furthermore, only those states qualify which satisfy the prerequisites of Article 62 or 63. However, there is no restriction in either article to states that are members of the United Nations or parties to the Statute of the Court.

If a state not party to the Statute were permitted to intervene, its relationship to the Court for that case would have to be determined (as well as its status as an intervening state!). Two problems could arise under Article 63. First, the status of a state as a party might be in doubt; in such a case, the Court should, if possible, favor an interpretation designating the state as a party, in line with a preference for the stable arrangement of behavior through treaty commitments. The Court's practice is to obtain details as to parties from the depositary, although this, too, might require interpretation. Second, although a party, a state may not receive the notification under Article 63. Here the Court should take a liberal attitude by allowing the state to demonstrate that it should have been notified and even by considering lack of notification as "exceptional circumstances"³⁹ justifying a late declaration of intervention.

Under Article 34 of the Statute, public international organizations may present relevant information to the Court on either their own or the Court's initiative, and any such organization has the right to be notified if the construction of its own constituent convention is in issue. While international organizations are given certain rights, they fall well short of intervention, as they have no *locus standi* in contentious cases. Miller has argued that intervention should be made possible for other international actors⁴⁰ so as to expand its potential and widen the base of international adjudication. This would obviously entail redrafting the Statute and favoring a far wider approach to the role of the Court in international adjudication than the restricted one referred to above. As will be seen, in the light of its present jurisprudence such a proposal is unlikely to be acceptable to the Court. Yet situations can be envisaged where the proposal could have advantages. For example, a multinational corporation might be allowed to intervene to protect its interests in circumstances such as those in *Barcelona Traction*,⁴¹ where no willing state was found competent to represent the shareholders' interests.

PURPOSES OF INTERVENTION

Why do states request intervention or make a declaration of intervention? Moreover, since under Article 59 nonparties are not bound by decisions of the Court, why risk being designated a party and thus being made subject to Article 59? In fact, very few states have availed themselves of the procedure, but their motivation may nevertheless be instructive.

³⁸ Statute of the International Court of Justice, Art. 34(1).

³⁹ 1978 Rules of Court, *supra* note 13, Art. 81(1) and Art. 82(1).

⁴⁰ Miller proposes a role for third persons as *amici curiae*, but he acknowledges that it would require a change of attitude by the Court. Miller, *supra* note 2, at 560.

⁴¹ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)* (New Application), 1970 ICJ REP. 4 (Judgment of Feb. 5).

As of the latest revision of the Rules, states are now obliged to state the precise purpose of their proposed intervention, so at least their expressed motives are readily identifiable. Naturally, there may be other implicit motives. When Italy made a request to intervene in the *Libya/Malta* case, Judge Nagendra Singh concluded⁴² that all Italy's goals could have been and, in fact, were achieved through the very application for intervention. The request had alerted the Court to Italy's interests, which it could not now ignore, while Italy had not needed to initiate separate proceedings, to establish any basis for jurisdiction, or even to succeed in its request. According to this view, the very strategy of applying to intervene is conducive to the provision of safeguards "for States whose vital rights could in the short or long term be seriously impaired."⁴³

Its recent decisions have emphasized that the Court regards it as vitally important to ensure that there is a proper purpose for intervention; and it is becoming increasingly evident that this purpose, which is not referred to in Article 62, is closely linked to the concept of a legal "interest" that must also be identified. Analysis of these decisions reveals that the Court has done much to define what will be regarded as improper purposes of intervention, but much less to assist in predicting proper ones.

Malta stated that its purpose was to be allowed to "submit its views to the Court on the issues raised in the pending case, before the Court has given its decision in that case."⁴⁴ It wished to put forward these views because of its claimed legal interest, which rested upon its location vis-à-vis Libya and Tunisia in that at some point the boundaries of their continental shelves would come up against its own. Malta stressed that it was not seeking any ruling regarding its own shelf but was fearful lest its interests there might be affected by the Court's decision, both through that decision's formal operation and through the enunciation of substantive elements of law.

Malta, therefore, was not seeking to intervene in respect of interests in common with either party, but as an independent participant wishing to raise its own concerns. Italy, too, did not wish to ally itself with the original parties but to present and seek protection for its own interests. Both Malta and Italy denied that they were raising fresh disputes or that they wanted to make specific claims against any of the original parties, or to join their interests with those of the other parties. This emphasis on not seeking intervention as a party was partly motivated by the wish to avoid having their applications refused for lack of a jurisdictional nexus between themselves and the original parties, a concern that pervades much of their submissions.

In rejecting the Maltese request as inadmissible, however, the Court held that mere preoccupation with the principles of law that might be stated in the Court's judgment was insufficient. This interest is shared by many states

⁴² Italy, 1984 ICJ REP. at 31.

⁴³ This is Starke's definition of the purpose of Article 62. Starke, *Locus Standi of a Third State to Intervene in Contentious Proceedings before the International Court of Justice*, 58 AUSTL. L.J. 356 (1984).

⁴⁴ Malta, 1981 ICJ REP. at 9.

and is not "an interest of a legal nature applicable to Malta," which thus could not be allowed to present its views on the matter. In looking at "legal interest" in this way, the Court ignored the subjective phrasing of Article 62 in favor of deciding for itself whether there was a valid interest. In addition, the Court said, the precise purpose must not be vaguely expressed, for that would make it difficult for the original states to know what issues they should answer. Malta argued that its lack of precision had resulted in part from the refusal of the parties to grant it access to their pleadings; thus, it could only speculate on their arguments, a point the Court did not develop. At least some of the separate opinions⁴⁵ observed with concern that Libya and Tunisia also had not specified their claims with precision, and these judges concluded that the failure of Malta to make assertive claims or to seek definitive rulings should not be a basis for rejecting its request.

By these holdings the Court protected the interests of the original parties and allowed them a lack of specificity in determining the parameters of their claims that was denied to a state requesting intervention. This approach supports the concept of party autonomy in international litigation, which would be impeded by vaguely worded and imprecise interventions. Indeed, this is just one example of the favoring of party autonomy that appears to permeate the majority decisions in both the Maltese and Italian requests for intervention. In both cases, jurisdiction over the original dispute was based upon a bilateral special agreement, a factor that may have influenced the Court's decision to limit the ambit of the case to the claims presented in the agreement.

Nevertheless, such a decision ignores the fact that any claim for permission to intervene must involve speculation, for it cannot be known what the outcome of the proceedings will be. Likewise, the Court does not know at this preliminary stage how the hearings on the merits will materialize. Thus, there is genuine uncertainty as to whether an interest of the would-be intervenor will be affected. Article 62, however, appears to resolve this problem, for it only requires that the interest "may" be affected, not that it will be affected, or even is likely to be affected. This wording suggests that the requesting state should not be put to a high standard of proof; it should suffice for it to show that it has an interest that is at least pertinent to the proceedings. If it eventuates that the requesting state's interest will not be affected, the provisions of Article 62 will not have been undermined and the presumption should be in favor of protecting interests.

Italy had to seek to avoid this restrictive ruling and thus was more explicit in its statement of purpose. It wished "to ensure the defence before the Court of its interest of a legal nature," viz., "respect for its sovereign rights over certain areas of continental shelf."⁴⁶ This statement shows how closely

⁴⁵ See, e.g., *id.* at 35 (Schwebel, J., sep. op.); and *id.* at 32 (Oda, J., sep. op.).

⁴⁶ Italy, 1984 ICJ REP. at 10, 12. Judge Sette-Camara felt that the Court should not link interest and purpose in this way, for "interest of a legal nature" is demanded by the article itself and should not be confused with the extra requirement of "precise purpose." *Id.* at 81 (Sette-Camara, J., dissenting).

legal interest is associated with the purpose of intervention; hence, the Court must isolate the true object of the claim. In doing this, the Court must have regard to all the circumstances of the case, the nature of the subject matter, the nature of the legal interest and the potential impact of its judgment.

In this instance, the majority⁴⁷ decided that it would be the "unavoidable practical effect . . . that the Court will be called upon to recognize those rights, and . . . make a finding . . . on disputes between Italy and one or both of the Parties."⁴⁸ It is not a valid purpose of intervention to allow the intervening state to bring in an extraneous dispute, or to use the opportunity to assert additional, individual rights. In effect, the Court defined the true purpose of Italy's request in wider terms than had Italy and found it inappropriate. These two cases demonstrate the Scylla of leaving the purpose vague and unspecific against the Charybdis of saying too much.⁴⁹ The power the Court has asserted to determine what is in fact a proper purpose amounts in practice to defining admissibility of intervention, although Article 62 itself makes no reference to proper purpose.

There may be clearer cases of improper purposes for intervention such as an attempt by the requesting state to delay the main case for its own motives, or to prevaricate, or to use intervention along with other diplomatic steps against one or more of the parties. The Court would then be justified in refusing the request, but its refusal could be based on the lack of a good faith request within the terms of Article 62.⁵⁰ The same would be true of an attempt to acquire an advisory opinion, which is not available to states, under the guise of intervention. While the Court should reject blatantly wrongful purposes, it should be cautious of being so restrictive as to make it almost impossible to satisfy this condition.

Neither Malta nor Italy wished to be identified with either of the original parties. This may not always be the case and a valid purpose of intervention may be for the requesting state to attempt to join its interests with those of one of the parties. Thus, Fiji, when it requested intervention in the *Nuclear Tests* cases,⁵¹ obviously wished to align itself with Australia and New Zealand against France. This implicit motive more easily allows the intervening state

⁴⁷ The Italian request was rejected by a majority of 11 to 5, while the Maltese request was rejected unanimously; thus, in the *Italian* case intervention came closer to being accepted.

⁴⁸ Malta, 1981 ICJ REP. at 19. For a discussion of the purpose of the Maltese request, see Jessup, *supra* note 11; and for a comparison between the two cases, see Starke, *supra* note 43.

⁴⁹ Italy argued that there was no dispute between itself and the original parties; it merely wished to safeguard its rights. This position was ironically supported by Libya, which argued that as there had been no dispute, there could be no intervention. The Court held that it was for itself to determine whether the request in fact raised a new dispute that the Court would be required to resolve. Article 62 requires only a subjective apprehension that interests may be affected; their protection should be possible without ruling the request impossible as raising a new dispute. This illustrates how difficult the Court has made it for a state to satisfy it with a precise purpose without being deemed to have said too much.

⁵⁰ See W. M. REISMAN, NULLITY AND REVISION 329 (1970).

⁵¹ Fiji requested to be permitted to intervene in the case between Australia and France on May 16, 1973, 1974 ICJ REP. at 255, and in the *New Zealand* case on May 18, 1973, 1974 ICJ REP. at 459.

to be perceived as a party, and it may well be that the perceived role of the intervenor as party or participant will depend upon its purpose in requesting intervention.

Judge Elias refers to a third purpose of intervention, which is to serve as a replacement for one of the parties so that it may withdraw, but he adds that this form has had no practical application.⁵² A state may wish to intervene to assert its rights against all the other parties, as opposed to just one side. This would have been the purpose of Albania had it intervened in the *Monetary Gold* case,⁵³ and apparently would have been accepted by the Court as valid.

A state may also wish to intervene against one of the other parties on an issue tangential to the original proceedings (unlike Fiji, where the purpose related directly to the main issue in the case). Afghanistan indicated that it had an interest in Pakistan's claims regarding state succession in the *Pakistani Prisoners of War* case⁵⁴ where the major contentious issue was the repatriation of prisoners of war. No formal request for intervention was made, as the case was removed from the Court's list. One suspects, however, that such a request would have been inadmissible as introducing a new dispute, or as not relating to the same subject matter, although the judgment might well have made assumptions about Pakistan's status that might have affected Afghanistan.

Another argument made by Italy justifying its request for intervention was that it would assist the Court in establishing an overall picture of the situation. The Court rejected this offer of assistance on the grounds that the criterion for intervention is not whether it will be useful or even necessary to the Court, but whether Article 62 is satisfied.⁵⁵ Judge Fitzmaurice had made a similar suggestion in the *Barcelona Traction* case, saying that Canada could have been asked to intervene so as to cast further light on the status of the company.⁵⁶ The *Italian* case seems squarely to reject such an idea and the *Nicaragua* case supports the rejection. In *Nicaragua*, the Court held that there was no rule enabling it to direct a state to become a party to proceedings before it, nor was there any practice on the matter.⁵⁷ The Court was speaking in the context of original parties, for the United States had argued that Honduras, Costa Rica and El Salvador were indispensable to the proceedings; but the same attitude would very likely prevail regarding intervention. Indeed, here the wording of Article 62 suggests that the Court cannot direct

⁵² T. ELIAS, *supra* note 11, at 94.

⁵³ Case of the monetary gold removed from Rome in 1943 (Italy v. Fr., UK, U.S.), Preliminary Question, 1954 ICJ REP. 19, 32 (Judgment of June 15).

⁵⁴ Trial of Pakistani Prisoners of War (Pak. v. India), Interim Protection, 1973 ICJ REP. 328 (Order of July 13).

⁵⁵ Italy, 1984 ICJ REP. at 25.

⁵⁶ 1970 ICJ REP. at 80 (Fitzmaurice, J., sep. op.), where he said that "the intervention of the Canadian Government under Article 62 . . . should have been sought, in order that its views might be made known."

⁵⁷ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 431, para. 88 (Judgment of Nov. 26) [hereinafter cited as *Nicaragua Jurisdiction*].

intervention; the state must feel that its interest may be affected and the Court can only decide after a request to intervene has been made. The Court can indicate that intervention might be appropriate, but no more.⁵⁸

Even under Article 63, where the supposed purpose of intervention is apparent and the Rules do not require that it be specified,⁵⁹ other purposes may predominate, leading the Court to determine whether the intervention is "genuine." In the *Haya de la Torre* case, Cuba claimed it was intervening under Article 63 with respect to the 1928 Havana Convention on Asylum, to which Cuba was a party.⁶⁰ The Court held this not to be a genuine intervention, but rather an attempt to reopen an earlier case⁶¹ and, in effect, appeal against that judgment. Cuba was using the subsequent proceedings to take an action it could not take otherwise, and in this form the Court would not allow it. A similar argument was raised before the European Court of Justice in *Roquette and Maizena v. The Council*,⁶² where the European Parliament claimed the right of intervention. Its claim was allowed despite the argument that its only purpose was the improper one of attempting to circumvent its lack of capacity to take direct action under Article 173 of the Treaty of Rome.

The *Haya de la Torre* case demonstrates that the "right" in Article 63 is nevertheless susceptible to the Court's finding the intervention not to be genuine, and the fate of El Salvador's application reiterates that Article 63 will not be taken at face value. This case was unique: El Salvador seemed to intend to intervene at the jurisdictional stage, apparently to deny the Court's jurisdiction in a contentious case where other vital parties were not included, presumably to assist the United States in its jurisdictional arguments, and finally to challenge the admissibility of Nicaragua's Application. El Salvador clearly identified its interests with those of the United States, although it did not have to do so specifically, as it relied upon its being a party to the Statute and to other conventions in bringing a claim under Article 63. The Court evaded answering whether this constituted a genuine intervention by

⁵⁸ Elias comments that the Court "fell just short of inviting Albania to intervene in [that] case." He was referring, of course, to *Monetary Gold*. T. ELIAS, *supra* note 11, at 89. A state cannot be compelled to intervene by the Court nor, by analogy with *Corfu Channel*, by the Security Council. *Corfu Channel* case (UK v. Alb.), Preliminary Objection, 1948 ICJ REP. 15, 28 (Judgment of Mar. 25).

⁵⁹ Under Article 82 of the 1978 Rules of Court, *supra* note 13, a declaration under Article 63 shall include the case and convention to which it relates, particulars of the basis of being a party to the convention, the relevant provisions, the desired construction and any supporting documents.

⁶⁰ 1951 ICJ REP. at 74.

⁶¹ The Court held that Cuba's Declaration of Intervention was "devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata*." *Id.* at 77. The Judgment referred to was that in the Asylum case (Colom./Peru), 1950 ICJ REP. 266 (Judgment of Nov. 20).

⁶² 1980 ECR 3333, 3393. The purpose of the European Parliament's intervention was to protect procedural requirements, for the Council had failed to consult it, as required by the Treaty of Rome. On intervention before the European Court, see I D. VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 57-60 (1965).

deciding that the Declaration related more properly to the merits phase and presupposed jurisdiction.⁶³

This decision of the Court is regrettable; there appears to be no reason within the Statute not to allow intervention for the purpose of challenging jurisdiction or for construing the provisions of the Statute on jurisdiction differently from any other conventional terms for the purposes of activating Article 63. This is what Judge Lauterpacht argued for in *Norwegian Loans*,⁶⁴ and it is likely that only the scarcity of cases commenced under Article 36(2) since then has prevented the development of more jurisprudence on this point. Indeed, it appears to be only the reverse of what the Court decided in the *Monetary Gold* case,⁶⁵ where it would not accept jurisdiction because a state whose interests of a legal nature would be affected was not before the Court as party or intervenor. Why, then, should a state that wishes to make exactly this claim not be able to do so, especially when it can attach it to the appropriate conventions and so use Article 63? While a claim to challenge jurisdiction does not seem to be a wrongful purpose under Article 62, it is unlikely that a state can show a legal interest that may be affected by the very fact of litigation, except in the unusual type of situation that occurred in *Monetary Gold*.⁶⁶

INTERESTS OF A LEGAL NATURE

Malta was held to have had no interest of a legal nature since an interest in the enunciation of principles of international law was one common to all participants in the world community. This view concerned a number of judges,⁶⁷ typically Judge Oda, who stressed that any delimitation by Tunisia and Libya of their continental shelf involved a specific "area," not merely abstractions. Claims in this area by third parties would involve claims to rights *erga omnes* where the third party would be justified in not relying on Article 59. Italy expressed a desire to protect its "sovereign rights," as clear an example of an interest of a legal nature as can be imagined. The dismissal of Italy's request because it would have entailed the Court's pronouncing upon Italy's rights illustrates another dilemma for a would-be intervenor.

⁶³ El Salvador, 1984 ICJ REP. at 216.

⁶⁴ Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 ICJ REP. 9, 63-64 (Judgment of July 6) (Lauterpacht, J., sep. op.). This interpretation necessitates allowing for the possibility of intervention under Article 63 whenever jurisdiction is claimed under Article 36(2) of the Statute, or under another treaty. Given the complexities of Article 36(2), this appears to conform with the purpose of Article 63.

⁶⁵ 1954 ICJ REP. 32.

⁶⁶ Rosenne argues that since the facts of *Monetary Gold* are unique, the case can have little precedential value, and that it is still an open question whether the Court should refuse jurisdiction where the third party's interests are not the very subject matter of the claim. S. ROSENNE, LAW AND PRACTICE, *supra* note 2, at 431. Judge Schwebel stated that it was likely that the requisite legal interest under Article 62 would be too remote at the jurisdictional phase. El Salvador, 1984 ICJ REP. at 235. In that case, the Court rejected the argument that it should not take jurisdiction in the absence of other involved Central American states as parties or intervenors. Nicaragua Jurisdiction, 1984 ICJ REP. at 430-31.

⁶⁷ See, e.g., Malta, 1981 ICJ REP. at 23 (Oda, J., sep. op.); *id.* at 35 (Schwebel, J., sep. op.).

If a state believes its proprietary rights may be affected, it should intervene; but if making this request involves laying claim to the rights that might be challenged, it will be rejected as going beyond intervention. A state should not have to give formal evidence of its interest at this stage, as it merely has to feel that a legal interest may be affected. Only if successful in its request should it have to be more specific. A test requiring a state to give only prima facie evidence of those claims could be adopted so as not to defeat the request to intervene, but equally so as to avoid any suggestion of ruling on the merits.

Denying access to the Court does not protect third-party rights, although, again, it does protect the interests of the original parties in the integrity of their dispute. However, while integrity may be a valid concern where the case was commenced by a special agreement setting out the dispute in mutually agreed terms, it appears to be a far less valid concern where the case is a truly contentious one in which the parties made no such agreement and their interests do not coincide. In *Nicaragua v. United States*, the interests of the two states differed strongly at the time of the Declaration of Intervention by El Salvador; the United States denied that the Court had jurisdiction and that the case was admissible, while Nicaragua desired that it be heard on its merits. In such circumstances, it is unrealistic to think in terms of the integrity of the parties' dispute. The basis for jurisdiction in the original proceedings is another relevant factor when considering claims for intervention, but it has not been explicitly used by the Court.

"Legal interest" previously came before the Court in determining the interest required by an applicant state, notably in the *South West Africa Cases*.⁶⁸ There, in a notorious decision, the Court favored the restrictive view that the interest must be personal and include "rights and obligations which must be clothed in legal form."⁶⁹ Should the same approach be taken in the procedural context of intervention and, if not, should the interest required of an intervening state be stronger or weaker than that of an applicant state?

Questions of admissibility and intervention are quite distinct. Admissibility turns on whether the dispute is suitable for adjudication by the Court and, indeed, on whether a legal dispute exists; while in considering a request for intervention, the admissibility of the dispute between the original parties is presumed (or if it is denied, the request for intervention falls with the original case as in the Fiji request). In intervention the focus is on third-party interests in existing litigation. The difference between the two processes justifies distinct approaches. Since under Article 63 a weaker interest is already authorized (we have seen that merely being party to a convention is sufficient⁷⁰),

⁶⁸ *South West Africa (Eth. v. S. Afr.; Liberia v. S. Afr.)*, Second Phase, 1966 ICJ REP. 6 (Judgment of July 18).

⁶⁹ *Id.* at 34.

⁷⁰ No distinction is drawn under Article 63 between "conduct" provisions and "special interest" provisions, as was drawn in the *South West Africa Cases*. *Id.* at 29. It seems that any provision of a convention should activate Article 63. Thus, if there had been any entity capable of bringing contentious proceedings, Ethiopia and Liberia would have been able to make a declaration of intervention under Article 63. Reisman argues that the distinction between

and if intervention by a nonparty is legitimate, then there is a valid ground for allowing a more liberal notion of legal interest in the context of intervention.

Another related problem is raised by the El Salvador application, especially in the opinion of Judge Schwebel on the order for provisional measures.⁷¹ This is whether a legitimate purpose of intervention could be to raise fundamental issues of international law on behalf of the international community, that is, to assert that the "interest of a legal nature" is one shared by all other participants in the international legal process and that all states would benefit from the Court's pronouncing on the status of the norm.

Such a suggestion, of course, reactivates the issue of the 1966 *South West Africa Cases*.⁷² There a bare majority of the Court refused to allow Ethiopia and Liberia "to take legal action in vindication of a public interest" and so limited contentious proceedings to disputes raising direct interests of a legal nature between the parties. It has been argued that this formalistic restriction on the role of international adjudication was displaced by the decision in *Barcelona Traction*,⁷³ where the Court acknowledged that there are certain rights that because of their fundamental nature "are the concern of all States"; hence "all States can be held to have a legal interest in their protection."⁷⁴ The precise wording of this statement echoes that of Article 62 on intervention rather than that of Article 36 on jurisdiction.⁷⁵ Thus, according to this view, any state could claim an interest of a legal nature in the alleged violation of one of these peremptory norms and so intervene to raise these matters, which might fall outside the bipolar presentation of contentious proceedings.

If this argument were accepted by the Court, it would in such a case limit itself to determining whether the principle of international law involved was indeed a fundamental norm, which would gain the added advantage of providing judicial dicta on which norms can be so designated.⁷⁶ However, the

"conduct" and "special interest," if applied generally, would attenuate the dicta in *Mavrommatis* that any party to a multilateral treaty has an interest in its integrity and proper application (*Mavrommatis Palestine Concessions*, 1924 PCIJ, ser. A, No. 2, at 10-12), and would merge the grounds for intervention under Articles 62 and 63. W. M. REISMAN, *supra* note 50, at 333. There is no indication of this development in subsequent cases.

⁷¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Request for Provisional Measures, 1984 ICJ REP. 169, 190, 196 (Order of May 10) (Schwebel, J., dissenting) [hereinafter cited as *Nicaragua Provisional*]; El Salvador, 1984 ICJ REP. at 223 (Schwebel, J., dissenting).

⁷² 1966 ICJ REP. 6.

⁷³ 1970 ICJ REP. 4.

⁷⁴ *Id.* at 32.

⁷⁵ Under Article 36 of the Statute, the Court has jurisdiction over all "legal disputes"; whereas under Article 62, a state may intervene where it considers that it has "an interest of a legal nature."

⁷⁶ Under Article 53 of the Vienna Convention on the Law of Treaties, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Although there is much debate as to which norms constitute peremptory norms, those on the prohibition of the use of force, and on self-defense are obvious contenders. See [1966] 2 Y.B. INT'L L. COMM'N 247-48, UN Doc. A/CN.4/SER.A/1966/Add.1.

idea of a shared interest in the development of principles of international law as sufficient basis for intervention was firmly rejected in the *Malta* case⁷⁷—though the relevant principles in that case concerned the delimitation of a continental shelf. It can hardly be argued that an area of law that is subject to so much controversy and has led to numerous claims, of which many are still outstanding, could be regarded as being of so fundamental a nature. The concept of coastal state sovereignty over the continental shelf may be, but not the details on the resolution of competing claims.⁷⁸

The claims in the *Nicaragua* case illustrate how such a principle could operate. Nicaragua alleged that the United States was violating the norms of the Charter and other treaties,⁷⁹ as well as rules of customary international law relating to the threat or use of force. Judge Schwebel asserted that these claims could not be heard in isolation from the rights of the United States to territorial integrity and to collective self-defense, rights that belong to the entire community of states and, in the specific context, to the other states in the Central American region.⁸⁰ El Salvador was not obliged to indicate its legal interest because its application was made under Article 63, but it remains an open question whether it could have requested intervention under Article 62, at least at the merits phase. In all probability, much would have depended upon how El Salvador defined the purpose of its intervention and its legal interest in the dispute. If it had narrowed its claimed interest to its right to receive assistance from the United States in collective self-defense, it might have had some chance of success, as surely this would constitute an interest of a legal nature. However, if it had merely claimed its common interest in collective self-defense under the Charter, the *Malta* case suggests it would have been unsuccessful.

Even in the event of such a claim, the *Malta* and *Nicaragua* cases can be distinguished on the basis of the very different quality of the norms of international law involved; those relating to the prohibition of the use of force and the right to self-defense are strong candidates for acceptance as peremptory norms of international law. Another ground for distinguishing the cases is that delimitation of boundary disputes may be regarded as an inherently bilateral matter that should be closed to intervention by third parties and that can be effectively adjudicated on the basis of the special agreement between the original parties. A state that claims special interests should seek resolution in other ways than intervention, as *Malta* indeed did.

The latter dispute is very different from the ongoing one in Central America, which inevitably affects the interests of all states in the region. Yet this argument is weakened by the fact that the continuous nature of the dispute and its unsuitability for adjudication were raised by the United States

⁷⁷ *Malta*, 1981 ICJ REP. at 19.

⁷⁸ A view supported by the *North Sea Continental Shelf Cases*. See 1969 ICJ REP. at 41–42.

⁷⁹ It alleged violation of the UN Charter, the Charter of the Organization of American States, the Convention on Rights and Duties of States, 49 Stat. 3097, TS No. 881, 165 LNTS 19, and the Convention concerning the Duties and Rights of States in the Event of Civil Strife, 46 Stat. 2749, TS No. 814, 134 LNTS 45.

⁸⁰ *Nicaragua Provisional*, 1984 ICJ REP. at 196. "These fundamental rights of a State to live in peace, free of the threat or use of force . . . are rights of every State, *erga omnes*."

as reasons why the Court should refuse jurisdiction, and they were rejected by the Court. Since the argument was not a basis for finding the original case inadmissible, it might have been an acceptable purpose for intervention. However, the underlying strategies of the respective states are rather confused, as the United States denied the jurisdiction of the Court but favored the Declaration of Intervention to support its jurisdictional challenge. One must also remember that Judge Schwebel comes from a legal tradition that upholds liberal notions of joinder and intervention.

Judge Schwebel's comments suggest another possibility. May a party to contentious proceedings raise matters additional to those directly within the ambit of the dispute, not on behalf of third states but because they are the shared rights of all states and their protection and maintenance "do not rest upon narrow considerations of privity to a dispute before the Court"?⁸¹ In this way, a party could act both in its own inclusive interests and in those of other states and avoid the need for intervention. This route could be especially valuable when those wider interests are indeed general community interests and thus are unlikely to fall under Article 62, as currently interpreted. Since the refusal of the United States to accept the jurisdiction of the Court and to appear to argue the case on its merits, this line of reasoning is unlikely to be developed.⁸² The present position appears to be that there is no concept of intervention to uphold what could be termed "public rights," for the "legal interest" must appertain to the requesting state. However, in the *Italy* case, seemingly a paradigm of a private interest, intervention was also not allowed for the various reasons discussed. Intervention is not being developed by the Court as a means of protecting either private interests or interests of wider international concern.

LEGAL STRATEGIES

Interactions in the international arena that culminate in contentious proceedings before the Court are rarely exclusive to the parties before the Court. The vital questions for other states are to determine the level of intensity and involvement that warrants intervention and the most advantageous time to commence such action. Intervention, of course, is only one of the options available to a state that feels its interests may be affected by a case before the Court, and it may combine such a claim with other activities in the diplomatic arena, before other global or regional institutions, or domestically. Whether it makes an application to intervene will probably depend upon a multiplicity of factors, including its ability to benefit even from a rejection of the request, the impact of its action upon interested domestic

⁸¹ "The United States has, in the specific term of *Barcelona Traction*, 'a legal interest' in the performance by Nicaragua of its fundamental international obligations; . . . 'even if it is not immediately and directly affected' by the breaches of international law." *Id.* at 198 (Schwebel, J., dissenting).

⁸² U.S. Dep't of State, Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, reprinted in 24 ILM 246 (1985). See Franck, *Icy Day at the ICJ*, 79 AJIL 379 (1985).

and international audiences, and the predicted outcome of the proceedings. Malta, for example, incorporated intervention into several other strategies, including presentation of its case before the Security Council, attempts to be an original party to contentious proceedings and diplomatic moves. El Salvador, too, continued to participate in the Contadora process while seeking intervention.

Although accepting that intervention will not be an isolated action, this paper will focus on the strategy of intervention. Assuming that the preferred strategy involves using the Court, the first choice must be between commencing independent proceedings and requesting intervention. The Statute makes no provision for a state to present its views, without intervening, as an *amicus curiae* (except in the Article 63 situation),⁸³ though under Article 34 a public international organization may do so.⁸⁴ One wonders why states do not have the ability to bring matters of legitimate concern before the Court in this way when international organizations do. Indeed, perhaps that is what both Malta and Italy really wanted: to bring matters to the Court's attention in an official way to ensure that the Court could not disregard them. Although the Court rejected both of their requests to intervene, it had to assert that their rights would not be prejudiced. An *amicus* brief can be given little attention, but a state whose request to intervene has been refused with the assurance that because of Article 59 it will not thereby be prejudiced may in fact have succeeded in its aim.

Maybe *amicus* briefs were not allowed because it was feared that their inclusion would threaten party autonomy, expand the ambit of adjudication in specific disputes and force the original parties to respond to claims that they had not raised. Inclusion of *amicus* briefs would give recognition to the plurilateral nature of so many international disputes without entailing the consequences of intervention and would enable parties in the position of Malta and Italy to submit an *amicus* brief without having to request intervention. This option would necessitate revision of the Statute, perhaps in line with its Article 66 on advisory jurisdiction where the Court can receive statements from states entitled to appear before it. However, there are no original parties in requests for advisory opinions, and as the Court's function is to give an opinion only on a point of international law and not to decide a dispute, the two forms of jurisdiction are distinct and should give rise to diverse procedures.

Various factors may influence states into requesting intervention. The most obvious is that the requisite basis for jurisdiction for independent proceedings may not exist. The Court has still not resolved the jurisdictional

⁸³ In the request for intervention by Malta, the Court commented that Malta wished to present its views, "not objectively as a kind of *amicus curiae*," which perhaps implies this would have been allowed; but there is no provision in the Statute or Rules allowing for such a procedure. Malta, 1981 ICJ REP. at 18.

⁸⁴ Article 34(2) states that the Court may seek information from public international organizations, and that the latter may submit it on their own initiative. This provision was added in 1945. On its use and that of the relevant rule, Article 69 of the Rules, see S. ROSENNE, PROCEDURE, *supra* note 2, at 142.

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issue with respect to intervention under Article 62, which may be a major advantage; for even if the request is rejected, the Court will have been made aware of the state's concerns.⁸⁵ Malta attempted to cover a possible rejection on jurisdictional grounds by making a declaration under Article 36(2) of the Statute. This strategy was not referred to by the Court but was probably irrelevant, as jurisdiction in the original proceedings was based on the special agreement and not the optional clause.

Even if a state can negotiate a special agreement with one or both parties to the proceedings (as did Malta, which led to the subsequent case), or can find another basis for initiating its own proceedings, it will take time and will probably occur after the judgment in the pending case. Another potential obstacle to initiating proceedings may be the lack of a dispute between a state that wishes to intervene and the original parties. However, both Libya and Malta argued against Italy that this should also be an impediment to intervention; Italy had not previously indicated to them any disagreement relating to the shelf and thus should not be allowed to intervene. The Court did not rule on this point, but Libya and Malta wanted it both ways, as they also asserted that since the Italian request for intervention created a fresh dispute outside the special agreement, it must be refused.⁸⁶ The lack of a dispute for original proceedings may be averted by presenting the case in the special agreement in "quasi-adversarial" terms, as did Libya and Tunisia; but, again, it may be more economical in terms of money and time to raise extra points in proceedings that are already under way.

Possibly a major consideration for a state contemplating intervention is that even if successful, it may not be deemed a party under Article 59. This may be a rather open-ended calculation, however, as the Court has not pronounced upon the obligations resting on an intervening state. Malta stated that it would submit to all the "consequences and effects of intervention whatever these may be,"⁸⁷ perhaps a bold undertaking and one not demanded by Article 62. The complete lack of authority on the status of an intervening state under Article 62 may act as a deterrent to intervention, although the Court's present attitude makes a successful request unlikely.

A state may have good reasons for not intervening. It may not wish to specify what purposes it might have for intervention, as this forces it to disclose its ostensible hand and may preempt other diplomatic options it may wish to keep open, especially if the request is rejected. What has never been tested is whether the Court could use an estoppel argument against a state that does not request intervention by holding that it cannot subsequently

⁸⁵ Italy, 1984 ICJ REP. at 31.

⁸⁶ *Id.* at 14. This is part of the requirement that the intervention must relate to the same subject matter as the contentious case; "it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings." Haya de la Torre, 1951 ICJ REP. at 76. The Court was discussing intervention under Article 63, but this principle seems more applicable to intervention under Article 62. However, if the Court deems the subject matter of the requested intervention a fresh dispute upon which it will have to adjudicate, it will refuse the request. *See supra* note 49.

⁸⁷ Malta, 1981 ICJ REP. at 10.

claim an interest of a legal nature, as it took no steps to assert such a right during proceedings where it could have been affected. Suppose Italy had not requested intervention; could subsequent Italian claims to parts of the shelf be met by the argument that since it had not indicated a legal interest at the time of the proceedings, it could not do so later, on an analogy with failure to protest under the Anglo-Norwegian *Fisheries* case?⁸⁸ This argument seems unlikely to be successful in view of Article 59. In addition, protest is an action to be undertaken in a diplomatic forum; acting as a recipient of protests has no part in international adjudication and merely lodging them is not a proper purpose of intervention.

A state may decide not to request intervention in an attempt to deny the competence of the Court to adjudicate a dispute between other states. The possibility of this strategy is illustrated by the *Monetary Gold* case.⁸⁹ The Court held that it had no jurisdiction to decide the case because its decision would vitally affect the interests of a third state that was not before it. While it is not desirable to allow third states to prevent recourse to jurisdiction by such methods, it is problematic how such a strategy could be prevented. Rosenne argues that the *Monetary Gold* decision should be limited to the particular situation in which the third party's rights form the very subject matter of the dispute—the disposition of the Albanian gold—and should not be read as a general principle of wider application.⁹⁰ If it were taken as a general principle that a third state could make it impossible for the Court to adjudicate cases between other consenting states, the Court would be duty bound to consider whether its possible judgment could vitally affect another state, clearly an undesirable task except in such a clear-cut case as *Monetary Gold*.

If a state prefers to commence parallel proceedings instead of intervening, the Court may promote economy by directing joinder of proceedings under Article 47 of its 1978 Rules. This article allows for formal joinder or common action in the oral or written proceedings.⁹¹ The Court's practice suggests that although the rule says it is for the Court "to direct joinder," the parties will be consulted and if they do not desire joinder, it will not be directed. Thus, here is another strategy to consider. The *Nuclear Tests* cases involved similar claims brought by three states against a single state. Australia and New Zealand commenced parallel proceedings and did not have their cases joined, while Fiji requested intervention in each. The abrupt conclusion of the case prevented assessment of these diverse strategies. Of course, for joinder each party must have an established basis of jurisdiction, while the position is uncertain for intervention.

A state may find it difficult to determine its strategy because it cannot ascertain the ambit of a particular case before the Court. In theory, this

⁸⁸ Fisheries case (UK v. Nor.), 1951 ICJ REP. 116, 138 (Judgment of Dec. 18).

⁸⁹ 1954 ICJ REP. 32.

⁹⁰ S. ROSENNE, LAW AND PRACTICE, *supra* note 2, at 431.

⁹¹ This article was added in 1978. For discussion, see S. ROSENNE, PROCEDURE, *supra* note 2, at 108.

obstacle should not arise under Article 63 because of the duty of notification. However, as Judge Petré's dissenting opinion in the *Pakistani Prisoners of War* case shows, the issue may not always be uncontroversial.⁹² The original claims may not reveal that the construction of a convention will be in issue. In addition, while all members of the United Nations and other states entitled to appear before the Court are notified of pending proceedings under Article 40 of the Statute, it may only emerge from the pleadings that certain interests may be affected. Although pleadings can be made available to third parties upon request to the Court, the assumption is that they are not public and thus the request may be refused.⁹³ Fiji received the pleadings in the *Nuclear Tests* cases, together with Argentina and Peru, because none of the parties objected. But this was after the request to intervene had been made, and so could not have been instrumental in formulating Fiji's strategy. Both Malta and Italy were denied access to the pleadings because of parties' objections and had to rely instead on the limited public information available (the application and the special agreement) to determine the ambit of the original parties' claims.

It appears that if even one party objects, the pleadings will not be made available, which permits a state contemplating intervention only to speculate on their contents. Yet to protect the interests of the original parties, the Court demands specificity in a request for intervention under Article 62, which may only be feasible through access to the pleadings. As Judge Nagendra Singh pointed out, access to the pleadings is in the interests of justice,⁹⁴ and where it has been denied, perhaps the Court should construe the requirements of Article 62 more leniently. Allowing access to pleadings will not necessarily increase the incidence of intervention, for they may reveal that there is no basis for it; Iceland considered intervening in the *Western Greenland* case,⁹⁵ but scrutiny of the pleadings convinced it not to. Certainly, not all states that have received pleadings have gone on to request intervention.⁹⁶

There seems to be little justification for refusing pleadings, provided the rights of the original parties are protected by allowing them an opportunity to reply to any claims made by an intervening state, and even to reformulate their arguments. Article 53 of the Rules says that the Court is to decide upon requests for pleadings and that the parties have the right only to make their views known; but the present interpretation appears to allow the parties to veto what may be a very reasonable request. It is yet another example of the Court's protecting the rights of the original parties at the expense of a would-be intervenor and thus upholding the concept of party autonomy.

⁹² 1973 ICJ REP. at 333.

⁹³ See Art. 53 of the 1978 Rules, *supra* note 13.

⁹⁴ Italy, 1984 ICJ REP. at 33. "[I]t does not answer the call of judicial propriety if the would-be intervenor is asked to plead, blindfold . . ." (Nagendra Singh, J., *sep. op.*).

⁹⁵ See M. HUDSON, *supra* note 2, at 423, *cited in* Miller, *supra* note 2, at 567 n.43.

⁹⁶ E.g., in United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (Judgment of May 24), the pleadings were made public, but this led to no requests for or declarations of intervention.

Rosenne raises an additional problem relating to pleadings:⁹⁷ can the parties transform their dispute through their pleadings so that the case looks very unlike that presented in the application? The Court has allowed this to a certain degree; the parties may amend their submissions to take account of developments. They may not, however, turn the dispute into a totally different one, for that "would be calculated to prejudice interests of third parties"⁹⁸ that are entitled to be informed of applications to the Court so as to decide whether to request intervention. Nevertheless, as has been stated, a lack of specificity in the original claim may be tolerated; it is through the pleadings that parties clarify the extent of their claims and the desired remedy, especially if the case was brought by special agreement. Yet not only are pleadings essentially private, but they may contain new developments. Although the Court has formally preferred a compromise solution, it may be difficult to work in practice and may please no one. The original parties may claim that they are entitled to move their dispute in the direction they wish, in accordance with the principle of consent, while third parties may justifiably claim that a request for intervention is thus made even more speculative. This problem, too, may suggest that inherently bilateral disputes are unsuited to the admission of intervening states.

Parties to the original proceedings also have to consider their strategies. Primarily, they must decide whether to agree to granting another state access to the pleadings and so facilitate a request to intervene; and they must decide upon the appropriate response to such a request. The Statute gives the parties no rights in respect of the latter and the Fiji request shows that their acquiescence does not guarantee its acceptance. Under Article 83 of the Rules, the parties are informed of the request and are invited to make written submissions. Normally, formal objections lead to the holding of public hearings; even though none of the parties objected to Fiji's request, it was dismissed with the termination of the original proceedings without there being any hearings at all.

One could argue that even if none of the parties object, the Court should not refuse a request for intervention without a hearing. The separate declarations in the *Fiji* case suggest that there was concern lest the disposition of the contentious proceedings be deemed acceptance of the request to intervene.⁹⁹ Nicaragua followed a strategy of stating that it did not object to the intervention (and if intervention under Article 63 is as of right, it is arguable that the parties cannot object), and at the same time making state-

⁹⁷ S. ROSENNE, *LAW AND PRACTICE*, *supra* note 2, at 358.

⁹⁸ *Id.* Rosenne cites the case *Société Commerciale de Belgique*, 1939 PCIJ, ser. A/B, No. 78, at 173, to support this proposition.

⁹⁹ *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253, 457 (Judgments of Dec. 20). Separate declarations were entered by Judges Gros, Onyeama, Dillard and Waldock (jointly), and Jiménez de Aréchaga. Judge Gros thought the document filed by Fiji did not constitute a request to intervene, 1974 ICJ REP. at 531; Judges Onyeama and Jiménez de Aréchaga thought the lack of jurisdictional link fatal, *id.* at 532 and 533; Judges Dillard and Waldock thought there was sufficient jurisdictional basis for intervention and that Fiji should have had a hearing, *id.* at 532.

ments that challenged the validity of the Declaration. Since, theoretically, these did not constitute an objection, El Salvador had no right to a hearing at which it could reply to these adverse comments. The Court accepted Nicaragua's strategy at face value and so deprived El Salvador of a hearing,¹⁰⁰ a decision that flies in the face of equitable principles, common notions of justice and the Court's own Statute.

A final observation about strategy may be made here. The parties cannot agree formally or otherwise that they will allow intervention, for that would detract from the Court's power to decide the issue.

TIMING OF A PROPOSED INTERVENTION

A state must determine the optimal time for a request to intervene. The Rules of Court state that an application under both Article 62 and Article 63 must be made as soon as possible,¹⁰¹ but in any case before the closure of written proceedings under Article 62 and before the date fixed for the opening of oral proceedings under Article 63. Rosenne comments that the purpose behind these different time limits is unclear.¹⁰² In both cases provision is made for late applications in "exceptional circumstances." There is no authority on what the Court might accept as constituting exceptional circumstances. In the *Libya/Malta* case, Libya claimed that Italy's request was too late; its submission only 2 days before the expiry of the time limit disadvantaged the original parties who were by then committed to their arguments. The Court just noted that Italy was within the limits under Article 81 of the Rules and had therefore not run out of time.¹⁰³ Similar claims were made about Malta, which responded that it was justified in delaying intervention as long as possible since it had not received the pleadings.¹⁰⁴ Thus, a state may finely balance the request so as to maximize the time available to it, as long as it does not go over the due date.

The Rules do not specify at which stage of the proceedings these time limits apply. May a state request intervention in an application for interim measures (also incidental proceedings) or at the jurisdictional phase? Article 62 refers to a "decision of the Court," which would appear to cover jurisdiction since under Article 36(6) of the Statute jurisdiction is settled by "the decision of the Court." However, the Court "indicates" interim measures, which does not seem to fall within Article 62.¹⁰⁵ Article 63 permits intervention "whenever" the construction of a convention is in issue, and there is no reason why it should not mean just that.

¹⁰⁰ El Salvador, 1984 ICJ REP. 215. This contrasts unfavorably with the Court's previous practice; Cuba was granted a hearing in the *Haya de la Torre* case, as was Poland in the *S.S. Wimbledon*.

¹⁰¹ Article 81(1) specifies this for Article 62, and Article 82(1) for Article 63. 1978 Rules of Court, *supra* note 13.

¹⁰² S. ROSENNE, PROCEDURE, *supra* note 2, at 177.

¹⁰³ Italy, 1984 ICJ REP. at 8.

¹⁰⁴ See arguments of P. Lalive, counsel for Malta, ICJ Doc. CR 81/3, at 12 (Mar. 20).

¹⁰⁵ Article 41 of the Statute says the Court "shall have the power to indicate . . . any provisional measures."

The Court has acted restrictively here, too. The Court made no reply to the Fiji application or request to be heard; it decided that questions of jurisdiction and admissibility should be decided first and so deferred consideration of Fiji's request. "One of the consequences of this was the exclusion of Fiji from any participation in the provisional measures of protection phase."¹⁰⁶ In the *Nicaragua* case, Judge Schwebel pointed out that Article 41 provides for interim measures to protect the rights of "either party," which suggests that an intervening state is excluded,¹⁰⁷ especially as its status will not have been enunciated at that stage. However, if the request for intervention does not include asking for interim measures but only for the protection of interests at this early stage, it would seem reasonable to allow it then—provided it can be dealt with speedily so as not to delay unduly the application for interim measures. In *Pakistani Prisoners of War*, Judge Petrén dissented from the decision not to consider notifying other parties to the 1928 General Act and the Genocide Convention until after the decision on interim measures.¹⁰⁸ This decision again demonstrates the majority's regrettably restrictive attitude towards intervention, even in light of the mandatory language in Article 63.

Similar comments have already been made about the jurisdictional phase. It remains unclear whether the rejection of El Salvador's Declaration represents refusal to allow intervention at the jurisdictional phase or the conclusion that the particular claim belonged more accurately in the merits phase. The refusal to allow El Salvador a hearing where this could have been clarified continues to be the least supportable aspect of the decision.

Suppose the decision of the Court is handed down in a particular case and a third state then realizes that it affects some legal interest of its own. Is it then too late to intervene? The positivist answer is that because of Article 59 the decision does not bind any entity except the states parties to the case, so this is not a valid concern. Such formalism ignores the impact that decisions of the World Court have on the international prescriptive process. As Reisman put it, "certain decisions aimed at clarifying a value regime between two litigants can have great, if not their predominant, effect on third parties."¹⁰⁹ However, unless there are further proceedings, there can be no formal intervention at this point; and as the *Haya de la Torre* case shows, reopening an earlier decision is not a proper purpose of intervention.¹¹⁰

There is no equivalent in the ICJ Statute to Article 39 of the Protocol of the Statute of the European Court of Justice. Under certain conditions, this provision allows member states, Community institutions and any other natural or legal persons to institute proceedings to contest a judgment prejudicing their rights that was rendered without their being heard. The only relevant provisions of the ICJ Statute, Articles 60 and 61, allow parties alone to seek construction of a judgment, or in exceptional situations, its revision.

¹⁰⁶ S. ROSENNE, *PROCEDURE*, *supra* note 2, at 176 n.2.

¹⁰⁷ *Nicaragua Provisional*, 1984 ICJ REP. at 195 (Schwebel, J., dissenting).

¹⁰⁸ 1973 ICJ REP. at 334.

¹⁰⁹ W. M. REISMAN, *supra* note 50, at 136.

¹¹⁰ 1951 ICJ REP. at 77.

The jurisdiction of the European Court does not rest upon consent in the same way as that of the International Court, and the Treaty of Rome imposes wider obligations upon its parties than the Statute, so the situations are not parallel; but the mechanism provided for the former Court does indicate the predicament that could face a state.

Reisman discusses the unusual case between Costa Rica and Nicaragua before the Central American Court of Justice. Costa Rica was aggrieved that Nicaragua had concluded the Bryan-Chamorro Treaty with the United States without consulting Costa Rica, as provided for in the Treaty of Peace and Amity of 1858 between itself and Nicaragua. The Court decided that this Treaty did violate Costa Rica's conventional rights and that it was competent to decide the issue, despite the absence of the United States before the Court. This judgment amounted to a successful intervention by Costa Rica to the earlier *Cleveland* award between Nicaragua and the United States, which prejudiced Costa Rica's rights,¹¹¹ and so demonstrates the usefulness of such a procedure.

UNRESOLVED PROBLEMS OF INTERVENTION

There are major unresolved problems of intervention; in particular, whether a would-be intervenor must establish a jurisdictional link between itself and the parties, and the subsequent status of a state that is permitted to intervene. The analysis of both these issues may well rest upon the precise purpose of intervention as identified by the Court, the strategy adopted by the state to achieve that response and the Court's favored policy towards intervention. As the Court has consistently rejected requests to intervene on preliminary grounds, it has not faced these issues squarely. Several separate and dissenting opinions have done so, however, and have given these matters close attention.¹¹²

As was stated earlier, not all states requesting intervention share identical motives. Some may wish to make claims against one or all of the original parties (e.g., Fiji), while others may wish only to protect their inclusive legal interests (e.g., Malta and, on its own representation, Italy). This essential difference in purpose has caused some judges to express the view that different forms of intervention should be available:¹¹³ intervention as a party, and as a nonparty, variously described as a "participant," a "quasi-party" and a "non-party intervenor."

¹¹¹ W. M. REISMAN, *supra* note 50, at 333. *Costa Rica v. Nicaragua*, Central American Court of Justice, 11 AJIL 181 (1917). President Cleveland had given in 1888 an arbitral award confirming the validity of the 1858 Treaty. W. M. REISMAN, *supra*, at 334.

¹¹² Italy, 1984 ICJ REP. 3, separate opinions by Judges Nagendra Singh, Mbaye and Jiménez de Aréchaga, and dissenting opinions by Judges Sette-Camara, Oda, Ago, Schwebel and Jennings.

¹¹³ Notably, Judges Mbaye (Italy), Oda (Malta and Italy) and Schwebel (Italy). Views differ strongly among the various judges in the cases of the Fiji request, the Malta request and the Italy request as to whether a jurisdictional basis is required and when. Certain judges, e.g., Judges Morozov and Jiménez de Aréchaga, are adamant that there must be a basis for jurisdiction between a state requesting intervention and the original parties; others are more flexible.

Intervention is a procedural remedy known and accommodated by all legal systems in the world, ancient and modern, but there are numerous models within different municipal systems. Intervention can follow the "principal model," the "accessory model," the "assistance model" or the "aggressive model." International law should formulate the model or models best suited to the conflicting demands of international adjudication¹¹⁴ and not slavishly follow any municipal system. In any case, two forms of intervention are provided for under the Statute, for intervention under Article 63 is quite distinct from that under Article 62.

Under Article 63, the interest is assumed through participation in the convention whose construction is in issue. The intervening party need only be concerned in what may be the peripheral issue of its construction and it is only bound by the Statute to that limited extent. Jurisdiction to intervene is apparently bestowed by Article 63 once the preconditions of that article are satisfied. Cuba was permitted to intervene in the *Haya de la Torre* case, although it was not a party to the treaty establishing jurisdiction between Colombia and Peru, and no alternative basis was indicated.¹¹⁵ Interestingly, the Court referred to Cuba as the "intervening party," but in view of the limited status of an intervening state under Article 63, in particular the fact that it is not bound by the whole judgment, this labeling cannot be taken literally.

Since there are at least two forms of intervention under the Statute, why should all interventions under Article 62 conform to an identical, single model? Either the Court must conclude that there are two distinct forms of intervention, or else the jurisdictional nexus must exist in all cases, which would reduce even further the likelihood of a successful claim for intervention. However, if the need for a jurisdictional nexus is not demanded, both the applicant state and the consenting respondent state in contentious proceedings sacrifice the protection of the consent principle vis-à-vis third states, a situation that is likely to act as a deterrent to the use of the Court to settle international disputes.

The various judges who have proposed distinct models of intervention have differed over their precise operation, but it is possible to present the major thrusts of the proposals and to highlight the ensuing difficulties. The factors that would determine whether the intervening state is requesting intervention as a party or a nonparty are the purposes of intervention, the basis of consent between the original parties and the type of dispute in which they are involved.

Fiji's request to intervene was rejected because once the dispute between France and Australia/New Zealand had ceased, there were no longer any contentious proceedings in which to intervene. A few separate opinions stressed that they would have rejected the request anyway,¹¹⁶ because Fiji was not a party to the 1928 General Act and had not made a declaration

¹¹⁴ Judge Jiménez de Aréchaga identified a number of types of intervention: principal, adjudicative, supporting and competing. Italy, 1984 ICJ REP. at 67.

¹¹⁵ 1951 ICJ REP. at 77.

¹¹⁶ See *supra* note 99.

under Article 36(2) of the ICJ Statute, there was no *prima facie* basis of jurisdiction between itself and France, such as was claimed by Australia and New Zealand. To allow Fiji's request in these circumstances would violate the principle of reciprocity in Article 36(2), offend against the equality of states and create an unwarranted exception to the principle of consent as the basis of the Court's jurisdiction.

If a state wishes to make a claim against one of the original parties, a jurisdictional link is essential for intervention; a state cannot be allowed to use intervention as a substitute for contentious proceedings because the latter would be jurisdictionally impossible. The link can be established through Article 36(2), if possible, or through some other conventional jurisdictional provision, and will be stated in the request for intervention under Article 81(2)(c) of the Rules of Court. This interpretation gives meaning to the rule, for it alerts the Court and the original parties to the fact that the requesting state is claiming a jurisdictional link and can therefore be requesting intervention as a party. The requirement under Article 81(2)(c) does not mean that all requests must necessarily show such a link, for then the Rules would be modifying the Statute. The original parties may challenge the jurisdictional assertions in their replies under Article 83 of the Rules and at the hearing.

There still remain problems. Must the intervening state establish the jurisdictional link only with the original party against which it is making claims, or must it be able to do so against all the original parties? Since it is making its own independent claim and is not resting upon any of the other parties to establish rights but merely to provide the forum, it should be sufficient to establish jurisdiction only against that state. In joinder proceedings, the states joining actions do not have to demonstrate any jurisdiction *inter se*, but, of course, there can only be joinder with consent. Perhaps that should be the answer here: that parties against whom no claims are being made must consent to the intervention, but that no basis of jurisdiction with them need be shown. After all, if the requesting state can establish jurisdiction with the relevant state, it can commence its own proceedings and the other states would not have to accept the intervention.

One may also ask whether the requesting state's jurisdictional link has to be the same as the applicant state's, or whether it can be different. Suppose Fiji had had a treaty of amity with France containing a jurisdictional provision; could it have used that to establish jurisdiction, despite not being a party to the treaties used by Australia and New Zealand for the purpose? Perhaps the response should depend upon the basis for jurisdiction between the original parties. If jurisdiction rests upon a multilateral treaty, such as the General Act or the Statute of the Court, then jurisdiction for intervention could be based upon another treaty. Where there are multilateral treaty arrangements, it is hard to predict which states might be involved in adjudication before the Court. Thus, the state against which intervention is sought has little ground for arguing that it had not wished to consent to the involvement of the would-be intervenor. However, where jurisdiction is based upon a special agreement (as with *Tunisia / Libya* and *Libya / Malta*), then such

an original state party seems to have strong grounds for arguing that it intended adjudication upon that issue only with the other party to the agreement, which is a bilateral arrangement, and that to extend the dispute by allowing in another state on the basis of another treaty offends against the principle of consent. The same argument can be raised where jurisdiction is based upon forum prorogatum.

The major response to these arguments is that two states should not be allowed to prejudice third-party rights through bilateral agreements. However, in this situation the requesting state can still point to its own jurisdictional basis and commence independent proceedings. The greater problem lies with the state that cannot establish a jurisdictional nexus with the original parties; must it be automatically excluded from intervention?

At this point, the concept of nonparty intervention becomes relevant. When a state does not wish to make a claim against one of the other parties but wishes only to protect its interests, it should not be precluded from intervening as a nonparty, provided the other criteria of Article 62 are met. In this situation, it can be accepted either that no jurisdictional link is required, since intervention as a party is not sought, or that the interest of a legal nature provides the necessary nexus under Article 62.

It is still arguable whether the Court must grant the request when all the conditions of Article 62 are satisfied, or if it still retains some residual discretion of rejection. When the article was drafted, Lord Phillimore proposed the inclusion of explicit discretion enabling the Court to grant the request "if it thinks fit."¹¹⁷ This explicit, subjective discretion was rejected and the Court has asserted that it has no discretion to reject a request on broad policy grounds.¹¹⁸

The Court's assertion, however, can be questioned. First, Article 62(2) states that it is for the Court to decide the request without specifying any additional grounds for its acceptance or refusal. Article 62(1) does not provide that if all the criteria there listed are satisfied, the request must be granted, and the very concept of a request might be thought to imply an overriding discretion in the decision maker. Fitzmaurice expressed this opinion when he stated that the Court "is entitled to take into account the question of propriety, appropriateness, weight of interest etc."¹¹⁹ Whatever the view on this issue, its power to interpret the determinative concepts of "proper purpose," "legal interest" and "may be affected" in fact gives the Court wide discretion.

¹¹⁷ Lord Phillimore's proposal was that if a "State consider[s] that a dispute submitted to the Court affects its interests, it may request to be allowed to intervene; the Court shall grant permission if it thinks fit." Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux and Report*, June 16-July 12, 1920, at 593 (1920).

¹¹⁸ Malta, 1981 ICJ REP. at 12.

¹¹⁹ Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y.B. INT'L L. 1, 126 (1958). Fitzmaurice pointed out that intervention under Article 62 is not as of right and that therefore the Court must exercise a "quasi-discretionary" power under it, or else there would be no difference between Articles 62 and 63.

What is the status of a state that is allowed to intervene under Article 62 as a party? This question, of course, has never been tested. Presumably, such a state should be entitled to all the benefits and burdens of a party, which would turn the proceedings into a three-way litigation. The intervening state should be allowed to make submissions; it should be liable for costs under Article 64 of the Statute, able to claim a remedy, bound by the decision under Article 59 and entitled to enforcement proceedings. It should also be entitled to a judge *ad hoc* under Article 31 of the Statute, unless it is in common interest with an original party that already has selected a judge *ad hoc*. Malta nominated a judge *ad hoc* "for the purpose of the intervention proceedings,"¹²⁰ but it was refused because a state seeking intervention "has no other right than to submit a request to be permitted to intervene, and has yet to establish any status in relation to the case."¹²¹ Once a state's request is accepted and its status as a party ascertained, this entitlement must arise. This means that all issues under Article 62 itself must be decided without the benefit of a judge *ad hoc*, but as the request is for intervention and is not an application as an original party, this result does not seem unjust and may signify the major difference between a state that has become a party through intervention and an original party.

Indeed, after this speculation one is forced to query whether there is any major distinguishing feature between an intervenor as a party and the original parties. If not, then is there any justification for allowing intervention to make an independent claim where the state can establish its own jurisdiction, and, in any case, do such circumstances fall within the terms of the protective measure of Article 62? The only response appears to rely upon the policy of economy of litigation, which might be less forceful in international than in municipal adjudication. This analysis suggests that while a jurisdictional nexus is vital for intervention as a party, insistence upon it becomes self-defeating and carries the claim outside the proper purposes of intervention, which leaves intervention as a nonparty the major option under Article 62.

A nonparty intervenor must be able to make submissions on the subject matter of the intervention, must be entitled to the rights specified in Article 86 of the Rules¹²² and, by analogy with Article 63, will be bound by the judgment to the extent that it relates to the intervention. Although a nonparty intervenor is seeking protection of its own rights, when the judgment recognizes the rights of other states, "the intervening State will certainly lose all present or future claim in conflict with those rights."¹²³ A nonparty intervenor cannot be allowed the benefit of intervention without some corresponding commitment, a matter of concern to the Court in the *Malta* intervention case.

This proposal for two models of intervention under Article 62 can be supported on policy grounds, by the literal wording of the article and by

¹²⁰ Malta, 1981 ICJ REP. at 6.

¹²¹ *Id.*

¹²² I.e., to be furnished with copies of the pleadings and annexed documents (at last!) and to submit in writing observations on the subject matter of the intervention.

¹²³ Malta, 1981 ICJ REP. at 27 (Oda, J., sep. op.).

the negotiating history of the text, thus combining teleological interpretation with the ordinary-meaning approach. This interpretation gives some potential effectiveness to the article, which strict insistence on jurisdictional links does not, for the chances that an intervening state will be able to establish jurisdictional links with all the requisite parties must be remote. Judge Jennings emphasized that the principle of consent is also served, not violated, by allowing for intervention. The requesting state has not consented to other states' litigating upon matters that affect its interests; facilitating intervention could help it to avoid this dilemma.¹²⁴ It could be unjust to insist upon a jurisdictional link where the interests of a state may be affected, for if it cannot establish one, it will be forced to stand aside and do nothing.

Elias thinks the notion of nonparty intervention is absurd and finds it totally outside the scope of Article 62,¹²⁵ but the above arguments seem convincing. Furthermore, Article 62 is silent on jurisdiction and using Article 81 of the Rules necessitates that the Rules modify the Statute. Since an intervening state is not automatically deemed a party (and Article 62 does not use that word), intervention does not violate reciprocity or equality. Although there was some debate on jurisdiction in the negotiations on the article, there is no evidence that such limitations were intended. The then President of the Court, Judge Loder, stated that he "could not take a vote upon a proposal the effect of which would be to limit the right of intervention . . . to such States as had accepted compulsory jurisdiction. If a proposal in this sense were adopted it would be contrary to the Statute."¹²⁶ Judge Jiménez de Aréchaga's assertion that Article 62 was drafted when it was assumed that there would be compulsory jurisdiction, and that it should be so read,¹²⁷ seems unacceptable in view of the revision of the Statute in 1945, when no such "throwback" would have survived intact.

OPTIONS AVAILABLE TO THE COURT

It appears that the sole task of the Court should be to determine if a request under Article 62 or 63 is admissible in accordance with the criteria laid down in those articles. However, the practice of the Court reveals that it considers that it has more lines of action available to it than simple accept-

¹²⁴ Italy, 1984 ICJ REP. at 148-49 (Jennings, J., dissenting).

¹²⁵ T. ELIAS, *supra* note 11, at 95. Elias stresses the fact that the idea of allowing intervention without being a party was raised at the time of the 1972 revision of the Rules but was abandoned. He admits, however, that the "question remains as to precisely how far Malta should be deemed to have agreed to be bound in the light of Article 59 . . . and of the limited scope of the stated object of intervention." *Id.* The precise relationship between Articles 59 and 62 remains indistinct. If Article 59 is read literally, Article 62 is redundant; but "the slightest acquaintance with the jurisprudence of the Court shows that Article 59 does by no manner of means exclude the force of positive precedent. So the idea that Article 59 is protective of third States' interests in this sense at least is illusory." Italy, 1984 ICJ REP. at 157 (Jennings, J., dissenting).

¹²⁶ 1922 PCIJ, ser. D, No. 2, at 96. The Court in 1922 was divided over whether intervention was only available to those states which had accepted the compulsory jurisdiction of the Court. See Malta, 1981 ICJ REP. at 14.

¹²⁷ Italy, 1984 ICJ REP. at 55. Judge Jiménez de Aréchaga made the same point in the *Nuclear Tests* cases.

ance or rejection; admittedly, these are narrower than the adoption of a broader based conception of intervention such as that discussed immediately above would entail.

Under the Rules, the Court has alternative possible paths of action from the time when an application for contentious proceedings is filed. It must make a decision as to the notification of other states under Article 63. Article 43 of the Rules states that the Court "shall consider what direction shall be given to the Registrar in the matter." This is a new provision and Rosenne argues that it could incorporate a judicial element into this function, making it not solely an administrative task.¹²⁸ Judge Petrén's disagreement with the rest of the Court in *Pakistani Prisoners of War* confirms that this function can be subject to judicial interpretation.¹²⁹ The Court may also have to consider at a preliminary stage whether to allow would-be intervenors to have access to the pleadings as they are entered. An excessively restrictive attitude towards these preliminaries can severely limit the practical use of intervention.

Once an application to intervene has been received, the Court must provide the original parties with certified copies and invite them to make written submissions, if they wish, within a specified time.¹³⁰ Copies are also sent to the United Nations Secretary-General and to other states members of the United Nations, those entitled to appear before the Court or that have been notified under Article 63. If any of the original parties object to the application to intervene, the "Court shall hear the State seeking to intervene and the parties before deciding."¹³¹ In the case of El Salvador, at least some judges were concerned at the lack of clarity in the Declaration and thought a hearing should have been granted to resolve some of its ambiguities. Judge Oda believed that the Court should have consulted the United States and Nicaragua, while Judges Ruda, Mosler, Ago, Jennings and de Lacharrière considered a hearing essential.¹³² It is hard to see how justice was seen to have been done without a hearing, although, as was noted earlier, the Rules technically were not violated, as Nicaragua did not formally object.

There is a procedural requirement that the Court give priority to deciding issues of intervention,¹³³ so as to avoid delay for the benefit of both the original parties and the intervening state. If observed, this rule should prevent a repetition of the Fiji situation.

¹²⁸ S. ROSENNE, *PROCEDURE*, *supra* note 2, at 100.

¹²⁹ 1973 ICJ REP. at 333.

¹³⁰ Article 83 of the Rules, *supra* note 13, makes these principles applicable to both Article 62 and Article 63.

¹³¹ Article 84(2) of the Rules, *id.*

¹³² The decision not to give El Salvador a hearing was made 9-6; the majority gave no reason for this failure other than that jurisdiction must first be decided between the original parties. Presumably, the Court felt that the need to determine jurisdiction and admissibility derogated from the duty to give priority to a decision on the admissibility of a declaration of intervention under Article 84(1) of the Rules. If so, reasons would have improved the quality of the judgment. It is noticeable, but hardly surprising, that El Salvador did not follow the suggestion that it make a further declaration of intervention.

¹³³ Rosenne comments that Article 84(1) is a new rule and discusses it in the context of the Fiji request. S. ROSENNE, *PROCEDURE*, *supra* note 2, at 180.

Once the Court is ready to decide upon an application to intervene, it still has alternative courses of action open to it. It can, of course, refuse the application outright, as it did in all the recent cases. Refusal may not conclude the Court's interactions with that state; Malta might not have gone ahead with the special agreement with Libya had its request for intervention been successful, and El Salvador might have applied for intervention at the merits stage. Indeed, in the latter case, the Court indicated that a subsequent stage of the proceedings might be a more appropriate time to intervene. Judge Nagendra Singh thought that in so doing the Court was helping to place things in the order and sequence in which they belonged.¹³⁴

If the Court feels an application or declaration has been too broadly worded or combines wrongful purposes with valid ones, it can construe it so as to bring it within proper limits; its attitude towards Cuba in the *Haya de la Torre* case,¹³⁵ where it did this, contrasts strongly with its totally negative attitude towards El Salvador in the *Nicaragua* case, where it would not even assist in clarifying the Declaration. There is no reason why the Court could not also take such an initiative under Article 62.

When the Court rejects an intervention, it must still bear in mind the interests of the third party so as not to prejudice them; to this end, it may specify that its decision is without prejudice to such a party or it may rely implicitly on Article 59. However, neither course can avert the prescriptive impact of the Court's decision on the world constitutive process.

Finally, the Court may allow intervention, an outcome on which there is no experience under Article 62 and only limited, old experience under Article 63. We have seen that the Court has not worked out the consequences of a successful intervention or the obligations on an intervening party. It is also uncertain whether an intervening state can be awarded a remedy. Poland stated that it was not claiming special damages,¹³⁶ as its interests in free access to the Kiel Canal would be upheld by a declaration. If an intervening party were awarded a remedy such as damages, it would be hard to distinguish it from an original party, and it does not seem consonant with a protective procedure to award damages for loss incurred. In addition, a declaration in general terms as to the international legal position need not be directed at a specific state, although if a certain state had intervened, it could claim that the principles in the declaration were opposable to it. This still leaves open the exact relationship between Article 59 and an intervening state. There is no provision for being bound by only part of a decision, except by analogy with Article 63. As suggested earlier, the answers may depend upon whether the intervening state is characterized as a party or a nonparty.

• CONCLUSION

An examination of the cases where the ICJ has had occasion to consider a request for intervention or a declaration of intervention suggests that the

¹³⁴ El Salvador, 1984 ICJ REP. at 218.

¹³⁵ 1951 ICJ REP. at 77.

¹³⁶ S.S. Wimbledon, 1923 PCIJ, ser. A, No. 1, at 11. "It also states that it does not intend to ask the German Government for any special damages for the prejudice caused. . . ."

Court is unwilling to extend the scope of the procedure in any way that might threaten party autonomy.¹³⁷ While the Court has not enunciated any specific policy on intervention, the trend of decision is undeniably towards its restriction and containment within tight, but as yet not fully defined, limits. A brief survey of each of these cases may suggest the conditioning factors that influenced the Court in reaching its decision, as well as the restraints within which the Court feels it must operate so as to prevent the availability of intervention from discouraging states from using the Court for dispute resolution.¹³⁸

The first case where a request for intervention was made was *Wimbledon* and the request was adapted into a declaration under Article 63. It is not surprising that intervention was allowed; in the prevailing climate of optimism about the new World Court, there was no reason for a restrictive interpretation. Moreover, the subject matter, open communication routes, was regarded as of wide concern; the dispute was not inherently bilateral but involved world community values; and it concerned the interpretation of the major multilateral treaty of the day, the Treaty of Versailles.

The next case (some 30 years later) was also a declaration under Article 63. *Haya de la Torre* included elements of a regional dispute through the interpretation of a regional convention and regional practice relating to asylum. Cuba was a member of the region, and, although Peru objected, intervention in the modified form asserted by the Court as "genuine" was allowed. It seemed that process under Article 63 would be readily accepted, a view that was laid to rest in the case of El Salvador.

Much has been written¹³⁹ about why the Court avoided giving a decision in the *Nuclear Tests* cases through the device of ruling that there was no longer a dispute. The Court apparently feared that a final ruling would weaken its authority. The Fijian request was studiously ignored until it could simply fall with the dismissal. One feels that the request for intervention was just another feature of a case that the Court wished to have as little to do with as possible; and given the background of the French challenges to jurisdiction, the Court wished to avoid ruling on the intervention. Those judges that addressed themselves to the Fijian request made it clear that this was not an appropriate case for the use of Article 62 and referred to the jurisdictional hurdle.

¹³⁷ This conclusion is suggested most strongly by the recent cases (*Tunisia/Libya*; *Libya/Malta*) where the original dispute was framed in bilateral terms and most clearly represented adjudication as an essentially bilateral process. It is harder to fit the El Salvador claim into this characterization, as the parties had conflicting interests and had not defined the dispute between them, and the nature of the dispute was clearly plurilateral.

¹³⁸ Although, as has been discussed, certain judges in their separate and dissenting opinions have favored a broader based concept of intervention and have expressed concern that the procedure might become a dead letter. See especially the opinions of Judges Oda, Schwebel, Jennings, Sette-Camara and Mbaye in the respective cases.

¹³⁹ Franck, *Word Made Law*, 69 AJIL 612 (1975); Lellouche, *The Nuclear Tests Cases*, 16 HARV. INT'L L.J. 614 (1975); McWhinney, *International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case*, 3 SYRACUSE J. INT'L L. & COM. 9 (1975).

Unlike *Nuclear Tests*, which concerned wide-ranging general principles of international law, the *Tunisia / Libya* and *Libya / Malta* cases both concerned boundary disputes submitted to the Court through special bilateral agreements. In both cases, the parties objected to granting intervention, which perhaps gave rise to the apprehension that they might less readily comply with the judgment if the requests were granted. The Court had built up considerable expertise and credibility in boundary disputes and it may have been felt that to allow the interventions would threaten that development. Perhaps the Court now believes that its most effective strategy is to handle such disputes one at a time, as each arises, without interference from other states through intervention. The Court apparently views delimitation disputes as a series of bilateral disputes and not as ones involving a plurality of interests. If such concerns were in fact relevant to the Court, it created a considerable body of jurisprudence on the limitations of intervention while so deciding.

The rejection of the El Salvador Declaration is the hardest to explain, although some U.S. commentators have indicated that Washington saw it as stemming from the judges' preconceived notions as to the issues presented at this stage of the proceedings.¹⁴⁰ The Court allowed the original claim on arguably dubious jurisdictional grounds,¹⁴¹ yet did not permit El Salvador even to clarify its Declaration. Moreover, intervention under Article 63 had been thought to be as of right, provided the intervenor was a party to the convention being construed. The dispute was not inherently bilateral but affected other states, especially within the region. By analogy with *Haya de la Torre*, the regional interests should have made the Court readier to permit the Declaration, the more since neither side formally objected to it. The interests of the original parties in the course of the proceedings were entirely opposite, which also might have encouraged the Court at least to grant a hearing, so that it would not appear to be furthering one side's interests to the detriment of the other's. This last case demonstrates most forcefully the Court's reluctance to allow intervention and makes it impossible to predict with any certainty circumstances in which such a future claim is likely to be successful. The Court has denied the mandatory language of Article 63 and interpreted Article 62 so narrowly that intervening as either a party or a nonparty seems at present no more than a remote possibility.

¹⁴⁰ See, e.g., Franck, *supra* note 82, at 381.

¹⁴¹ *Nicaragua Jurisdiction*, 1984 ICJ REP. 392. For discussion of the decision, see Briggs, *Nicaragua v. United States: Jurisdiction and Admissibility*, 79 AJIL 373 (1985); and Franck, *supra* note 82.

THE RIGHT TO COMPENSATION: REFUGEES AND COUNTRIES OF ASYLUM

*By Luke T. Lee**

I. INTRODUCTION

The entire burden of caring for millions of refugees has until now been assumed by the uprooted refugees themselves, their countries of asylum, their countries of resettlement and donors, whether directly or through international organizations. Overlooked are the responsibilities of the countries of origin both toward their own citizens now turned refugees and toward the countries of asylum saddled with the burden of caring for those refugees. This paper focuses on the responsibilities of the source countries under international law to compensate refugees and countries of asylum. It is hoped that clarification and fulfillment of these responsibilities will contribute not only to the well-being of refugees and the alleviation of the burdens on their hosts, but also to the reduction or eradication of the very phenomenon of "refugees."

As its point of departure, this paper takes the definition of "refugee" adopted in the 1951 Convention Relating to the Status of Refugees. Consequently, the term "refugee" will refer to any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."¹ Thus excluded from the purview of this article are millions of persons displaced by wars, civil strife or natural disasters,² as well as the so-called economic refugees or migrants, whether legal or undocumented, who are motivated in their movement by

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¹ July 28, 1951, 19 UST 6259, TIAS No. 6577, 189 UNTS 150, Art. 1(A)(2). See also the 1967 Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 606 UNTS 267, 19 UST 6223, TIAS No. 6577, Art. I(2) (which incorporates the above definition).

² See, for example, the definition of refugee under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 UNTS 45, Article I(2) of which provides additionally:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

a desire for economic betterment but are often loosely referred to as "refugees."

Since, by definition, a refugee is outside his own country, this paper does not deal with the occasional phenomenon, under the municipal law of some countries, by which "refugees" are found within their country of origin.³ Nor does it deal with the right to compensation of former refugees who have returned to their homelands through voluntary repatriation.⁴ Finally excluded from the scope of this paper are the valuation aspects of compensation.⁵

In recognition of the need to strengthen the protection of the human rights of refugees, our inquiry is not limited to the traditional approaches to the status and rights of individual refugees under international law, but also focuses on the practical problems that obstruct their right to compensation.⁶ Emphasis is placed on how existing international institutions can facilitate the payment of compensation within the framework of the generally accepted principles of international as well as municipal law. What modifications in institutional structure or policies are needed to accomplish this objective? How can they be brought about?

II. HISTORICAL BACKGROUND

State responsibility for the creation of refugees includes compensation to both refugees and countries of asylum. Historically, however, only the right of refugees to compensation has received attention, albeit limited and unsystematized, to the near total neglect of the right of countries of asylum. In view of this neglect and the insuperable obstacles to claims by refugees to compensation from their own governments, some countries have resorted to mass expulsions of their own citizens, confident that they could do so with impunity.

³ Title II, §201(42) of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102) defines "refugee" to mean, inter alia:

(B) in such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

This provision has provided the basis for the Orderly Departure Program (ODP) administered by the UN High Commissioner for Refugees, under which "refugees" are airlifted from Ho Chi Minh City to Bangkok for onward journey to resettlement countries.

⁴ Article 1(c)(4) of the 1951 Convention, note 1 *supra*, provides, inter alia, that the Convention shall cease to apply to any person who "has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution."

⁵ There is a wealth of literature on the various valuation aspects of compensation, only a few of which need be mentioned: THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (3 vols., R. Lillich ed. 1972); G. WHITE, NATIONALISATION OF FOREIGN PROPERTY (1961); I. FOIGHEL, NATIONALIZATION (1957); A. LOWENFELD, EXPROPRIATION IN THE AMERICAS (1971).

⁶ Brownlie, *The Individual before Tribunals Exercising International Jurisdiction*, 11 INT'L & COMP. L.Q. 701, 702 (1962).

In addition to being underemphasized, the right of refugees to compensation has generally been linked at the United Nations to their right to voluntary repatriation. Thus, in the Progress Report of the United Nations Mediator on Palestine, submitted on September 16, 1948,⁷ Count Bernadotte named the twin rights of repatriation and compensation as forming part of both the "basic premises"⁸ and the "specific conclusions" for the settlement of the Palestine question. The relevant portion of the conclusions reads:

The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations conciliation commission. . . .⁹

The day after the submission of this report, Count Bernadotte was assassinated. Ralph Bunche, who succeeded him as the acting mediator, endorsed the twin rights of repatriation and compensation at a meeting of the First Committee of the General Assembly on November 25, 1948. In his view, as noted in the summary record, the General Assembly should reach "unequivocal conclusions" on, inter alia, the "[a]ffirmation of the right of Arab refugees to return to their homes if they choose to do so, with just compensation for those who could not or would not return, or whose homes had been destroyed."¹⁰

The substance of the Bernadotte-Bunche recommendations was embodied in a draft resolution submitted by the UK delegation. In addition, by explicitly basing the right of refugees to compensation on "principles of international law or equity,"¹¹ the resolution sought to imbue the right with a legal, and

⁷ Supplement to Part III of Progress Report of the United Nations Mediator on Palestine, 3 UN GAOR Supp. (No. 11), UN Doc. A/648 (1948).

⁸ *Id.* at 17, para. 3. The fifth of the seven basic premises reads: "The right of innocent people, uprooted from their home by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return." *Id.*

⁹ *Id.* at 18, para. 4(h).

¹⁰ 3 UN GAOR, pt. 1, C.1 (213th mtg.) at 771 (1948).

¹¹ See second revised draft resolution of Nov. 30, 1948, submitted by the UK delegation, 3 UN GAOR, pt. 1, C.1 Annexes at 61, 64, UN Doc. A/C.1/394/Rev.2, para. 11 (1948). On the relationship between international law and equity, Whiteman wrote:

International law includes within its compass a large body of equity. Accordingly the extent to which claimants have been allowed to recover damages in international cases on grounds of equity apart from legal rights under existing contracts constitutes an important phase of the subject under discussion. There are numerous cases where damages have been allowed in situations resembling, more or less closely, an implied or quasi-contractual relation.

The distinctions between the two are not, however, always maintained. Whiteman continued:

At times the reason is stated in the familiar terms of "equity" and, at other times, merely on the ground that international law allows recovery in such a situation. Whatever the reason given in the decision, the important point is that damages are allowed in situations

not merely a moral or political, character. The UK position was supported by the U.S. delegation, which collaborated on the drafting of the text with a view to expressing the principles simply.¹² Although Australia¹³ and Poland¹⁴ submitted draft amendments, they left the UK text intact as regards basing the right to compensation on international law or equity.

As eventually adopted, Resolution 194 (III) of December 11, 1948 stated in its paragraph 11 that the General Assembly:

Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, *under principles of international law or in equity*, should be made good by the Governments or authorities responsible;

Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations.¹⁵

This paragraph has been recited and reaffirmed every year by the General Assembly.¹⁶

While neither the right of refugees to compensation nor their right to voluntary repatriation has been effectively implemented, the former has been accorded even less attention by the United Nations and by state practice than the latter. For example, whereas the Statute of the United Nations High Commissioner for Refugees (UNHCR) specifically calls upon the High Commissioner to assist in "governmental and private efforts to promote voluntary repatriation,"¹⁷ nothing is said about his role in facilitating the

where it might be difficult to explain the decision on grounds of either the wrongful breach of or interference with an express contract.

3 M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1732 (1937) (footnotes omitted).

¹² 3 UN GAOR, pt. 1, C.1 (226th mtg.) at 909 (1948).

¹³ 3 UN GAOR, pt. 1, C.1 Annexes at 88, UN Doc. A/C.1/408/Rev.1 (1948).

¹⁴ *See id.* at 90 (revised amendment to the Australian amendment).

¹⁵ GA Res. 194 (III), 3 UN GAOR, pt. 1, Res. at 21, 24, UN Doc. A/810 (1948) (emphasis added).

¹⁶ *See, e.g.*, GA Res. 393 (V) (Dec. 2, 1950); GA Res. 1604 (XV) (Apr. 21, 1961); GA Res. 2452B (XXIII) (Dec. 19, 1968); GA Res. 2535A (XXIV) (Dec. 10, 1969); GA Res. 2672A (XXV) (Dec. 8, 1970); GA Res. 2792A (XXVI) (Dec. 6, 1971); GA Res. 2963A (XXVII) (Dec. 13, 1972); GA Res. 3089B (XXVIII) (Dec. 7, 1973); GA Res. 38/83A (Dec. 15, 1983); and GA Res. 39/33A and H (Dec. 14, 1984).

In its 22d progress report of Nov. 1, 1963, the Conciliation Commission announced the completion of the program of identification and evaluation of Arab property in Israel. *See* 19 UN GAOR Annex 11 at 1, UN Doc. A/5700 (1964).

¹⁷ Para. 8(c), GA Res. 428 (V), Annex: Statute of the Office of the United Nations High Commissioner for Refugees [hereinafter cited as UNHCR], 5 UN GAOR Supp. (No. 20) at 46, UN Doc. A/1775 (1950). On the role of the UNHCR in voluntary repatriation, see Hofmann, *Voluntary Repatriation and UNHCR*, 44 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES

provision of adequate compensation to refugees. In practice, the UNHCR has sponsored voluntary repatriation programs resulting in the return of 32,000 Ethiopian refugees from Djibouti between September 1983 and the end of 1984.¹⁸ Elsewhere, it organized the repatriation of some 27,000 Ugandan refugees from Zaire and nearly 6,000 Ugandans from the Sudan;¹⁹ 12,000 refugees of various nationalities from Spain, with the largest number returning to Argentina;²⁰ and an unspecified number of Laotian refugees from Thailand.²¹ By contrast, neither the UNHCR nor states²² have concerned themselves recently with the refugees' right to compensation.

Inevitably, we must reconsider the wisdom of continuing to care for the world's refugees without also addressing ourselves to the root causes of the refugee problem and its solutions. Such solutions entail, at a minimum, the definition and implementation of the rights of both refugees and countries of asylum to compensation.

III. LEGAL PRINCIPLES UNDERLYING BOTH RIGHTS

For the most part, both refugees and countries of asylum are analogous to other victims that have sustained injuries as a result of a state's violation of international law and human rights. As early as 1646, Grotius enunciated the legal maxim that every "fault creates the obligation to make good the loss."²³ For, according to Verdross, to deny the liability of a state for wrongs it has committed would in effect abolish the duty of states to observe the rules of international law.²⁴ The most common remedy for the breach of an international obligation is adequate compensation, which may be defined as "the payment of such a sum as will restore the claimant to the position the claimant would have enjoyed had not the breach (tort, unjust enrichment,

RECHT UND VÖLKERRECHT [ZAÖRV] 327 (1984). See also NAGENDRA SINGH, *THE ROLE AND RECORD OF THE UN HIGH COMMISSIONER FOR REFUGEES* 53 (1984); Voluntary Repatriation (background paper prepared for the Round Table on Voluntary Repatriation, convened by the UNHCR in cooperation with the International Institute of Humanitarian Law, San Remo, Italy, July 16-19, 1985).

¹⁸ See Note on International Protection, submitted by the High Commissioner, UN Doc. A/AC.96/660, at 9 (1985).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* For earlier developments, see U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 1984, at 44-45; DEP'T OF STATE, *COUNTRY REPORTS ON THE WORLD REFUGEE SITUATION: REPORT TO THE CONGRESS FOR FISCAL YEAR 1985*, at 4 (1984); *NEW AFRICAN* (London), December 1984, at 44.

²² Other than voting for relevant General Assembly resolutions. See, e.g., note 16 *supra*.

²³ H. GROTIUS, *DE JURE BELLI AC PACIS*, bk. II, ch. XVII, pt. 1, at 430 (1646 ed., Carnegie Endowment trans. 1925). Three elements must be present: (1) possible fault on the part of the respondent government, (2) "loss" sustained, and (3) reparation to "make good" the loss. The burden of proof rests on the claimant to show that an international wrong has been committed, and that pecuniary loss has been sustained by reason of the wrongful act. See 1 M. WHITEMAN, *supra* note 11, at 430.

²⁴ A. VERDROSS, *VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* 164 (1926). See also S. GOLDSCHMIDT, *LEGAL CLAIMS AGAINST GERMANY* 64 (1945).

deprivation of contract expectations) occurred."²⁵ The duty to make reparation is based on the fact that "in international law, as in domestic law, rights without remedies are illusory, i.e., 'no rights' at all."²⁶

Eagleton described state responsibility as follows: "Responsibility is simply the principle which establishes an obligation to make good any violation of international law producing injury, committed by the respondent state. . . . Whether reparation be made through diplomacy or in any other manner is a matter of procedure, and an entirely distinct problem."²⁷ Over the centuries, this fundamental principle has been a cornerstone of interstate relations.²⁸ Article 1 of the International Law Commission's draft articles on state responsibility (part 1) reflects the importance of this principle by providing: "Every internationally wrongful act of a State entails the international responsibility of that State."²⁹

Such a precept applies not only in the international sphere, but also under municipal law—whether in terms of civil wrong (tort), breach of contract or the illicit taking of property. As Professor Covey Oliver succinctly stated: "In general, international applications of the basic principle of compensatory damages follows [*sic*] the common usages of municipal legal systems in this regard."³⁰

IV. THE RIGHT OF REFUGEES TO COMPENSATION

LEGAL BASES

As individuals outside their own country but still bearing the nationality of that country, refugees face formidable substantive as well as procedural obstacles under traditional international law to seeking compensation from their government. Such obstacles derive, for example, from their status under international law and the lack of a forum in which they can institute pro-

²⁵ Oliver, *Legal Remedies and Sanctions*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 61, 71 (R. Lillich ed. 1983).

²⁶ *Id.* at 61.

²⁷ C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 22-23 (1928).

²⁸ The issue of war and peace, for example, has often arisen out of differing perceptions of the "wrong" committed, with the concomitant demand for reparation. In the imperfect world of "might is right," the victorious naturally impose upon the vanquished treaties of "peace," which often contain a reparation clause.

In view of concern that "reparation" should match the breach of an international obligation, the optional clause to the Statute of the International Court of Justice, Article 36(2), includes among the types of legal disputes covered by the Court's jurisdiction, disputes on "the nature or extent of the reparation to be made for the breach of an international obligation."

²⁹ See Draft Articles on State Responsibility, Part I, adopted on first reading by the International Law Commission, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 30-35, UN Doc. A/CN.4/SER.A/1980/Add.1. For commentary on this article, see Second Report on State Responsibility by Roberto Ago, [1970] 2 *id.* at 179-97, UN Doc. A/CN.4/SER.A/1970/Add.1. For an analysis of the draft articles and massive exoduses, including the question of the attribution to the state of the conduct of organs or persons, see Hofmann, *Refugee-generating Policies and the Law of State Responsibility*, 45 ZAÖRV 694 (1985). See also the subsections on "Indirect Responsibility," "State Responsibility" and "Sanctions" of section V *infra*.

³⁰ Oliver, *supra* note 25, at 71.

ceedings against their government. However, as underscored at the end of section I above, this paper focuses on the practical problems that impede fulfillment of the refugees' right to compensation within the framework of the generally accepted principles of international law and under municipal law. We have already discussed the legal principles underlying the rights of both refugees and countries of asylum to compensation; we now examine the principles relevant to each right separately, with proposals for their effective implementation.

Municipal Law

From the standpoint of municipal law as well as international law, an act by a state that transforms its own citizens into refugees is *ipso facto* illegal. The municipal law of virtually all countries guarantees the rights of their citizens to life, liberty, equality, property, due process, etc.³¹ The mere existence of refugees, as defined by the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol,³² shows that their own governments have violated these rights.

Thus, a country that is ruled by law must refrain from turning its citizens into refugees. If refugees have already been created, it should provide them with the opportunity for voluntary repatriation and compensation, whether pursuant to the principle of torts, unjust enrichment, abuse of rights or unconstitutionality. The Federal Republic of Germany has undertaken a large-scale program of compensating Jews that were forced to leave Germany during the Nazi period for their loss of property, liberty and dignity.³³ Shortly after the downfall of Idi Amin, the Ugandan Government appointed a committee to handle compensation claims by thousands of Ugandans of Indian descent who were expelled in 1972.³⁴ Properties of some Chinese refugees taken over by the People's Republic of China have reportedly been restored to the owners or compensated for.³⁵ These instances show that governments are increasingly sensitive to the need to comply with their own laws, rooted in justice and equity.

International Law

Human Rights Law. When a state forces its citizens into becoming refugees either directly or indirectly,³⁶ it is violating such movement-related provisions of the Universal Declaration of Human Rights³⁷ as: Article 9, "No one shall

³¹ See CONSTITUTIONS OF THE COUNTRIES OF THE WORLD *passim* (A. Blaustein & G. Flanz eds.).

³² See *supra* note 1.

³³ See L. LEE, CONSULAR LAW AND PRACTICE 201-02 (1961); G. BLESSIN, H.-G. EHRING & H. WILDEN, BUNDES-ENTSCHÄDIGUNGSGESETZ KOMMENTAR (2d ed. 1957).

³⁴ N.Y. Times, Mar. 23, 1980, at 5, col. 1.

³⁵ Based on information obtained by the author while a visiting professor at Peking University in September-October 1985.

³⁶ For a discussion of "indirect coercion" and mass expulsion, see note 59 *infra*.

³⁷ GA Res. 217A, UN Doc. A/810, at 71 (1948).

be subjected to arbitrary arrest, detention or exile"; Article 13(1), "Everyone has the right to freedom of movement and residence within the borders of each State"; Article 13(2), "Everyone has the right to leave any country, including his own, and to return to his country"; Article 15(1), "Everyone has the right to a nationality"; and Article 15(2), "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." To the above may be added Article 14(1), "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Although this article appears to encourage a citizen to become a refugee, its explicit linkage to "persecution"—the most critical element in the definition of "refugee"³⁸—makes the movement in effect a coerced one.

Making a person a "refugee," however—someone who by definition is arbitrarily deprived of the right to live in his own country³⁹—does not violate merely the above movement-related rights. It also violates any rights, whatever their legal sources, that depend to any extent for their full and effective enjoyment on a person's ability to live in his own country. A review of the Universal Declaration shows that the full and effective enjoyment of all the rest of its articles hinges upon that ability. Certainly, making a person a "refugee" would seriously affect his birthrights to "life, liberty and security of person" (Article 3); employment (Article 23); education (Article 26); family (Article 17); property (Article 17); social security (Article 22); nondiscrimination (Article 2); dignity (Article 1); equality before the law (Article 7); freedom of opinion and expression (Article 19); freedom of peaceful assembly and association (Article 20); participation in government and public service (Article 21); and so forth. Thus, the country that turns its own citizens into refugees is in violation of *all* the articles of the Universal Declaration of Human Rights.

Such a total violation suggests that the act of generating refugees might qualify as an "international crime," which would put it on a par with slavery, genocide and apartheid. For Article 19(3)(c) of the draft articles on state responsibility (part 1) adopted by the International Law Commission defines an "international crime" as, among others, "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*."⁴⁰ Since "slavery, genocide and *apartheid*" are cited for illustrative purposes, and are not meant to be exhaustive, any act that falls within the above definition would be deemed an "international crime." The author believes that the generation of refugees, because it violates *all* the articles in the Universal Declaration of Human Rights, meets this definition of an "international crime," and entails all the implications that go with it.⁴¹

Does a state have the right to generate refugees provided it is willing and able to pay them adequate compensation? Suppose a state, after weighing its liability for financial compensation against the potential political, ideo-

³⁸ See note 1 *supra*.

³⁹ *Id.*

⁴⁰ See text accompanying note 117 *infra*.

⁴¹ See the subsection "Sanctions" of section V *infra*.

logical, security,*ethnic and religious consequences, decides that its national interest lies in getting rid of a certain group of people even at the cost of paying them compensation. Can it, in effect, purchase the right to generate refugees?

The answer must be in the negative. In the first place, as noted above, the act of creating refugees amounts to an "international crime." As a crime committed *erga omnes*,⁴² the appropriate response would be for the international community as a whole to impose collective sanctions, as provided by Article 14(2) of the Riphagen draft.⁴³ Such sanctions might well include compensation. However that may be, making refugees of one's citizens certainly involves gross violations of fundamental human rights; and just as the right to engage in slavery, genocide or apartheid cannot be purchased, so, too, the right to generate refugees is unpurchasable. The notion of the inalienability of fundamental human rights precludes the balancing of such human rights interests against economic interests.

In sum, creating a refugee and failing to make compensation are two separate legally wrongful acts: the wrongfulness of the former is based directly on human rights law; that of the latter, on the law of state responsibility. The former remains a legally wrongful act whether or not the latter is corrected. Even in the *Trail Smelter* case,⁴⁴ where the damages were caused by air pollution, and hence were more susceptible to judicial weighing of interests or regulation, the tribunal ruled that a state could not "purchase," through compensation, the right to continue the injurious activity.

Many principles of human rights embodied in the Universal Declaration of Human Rights have been concretized in treaties. For example, Article 13 of the Universal Declaration, which affirms the right to freedom of movement and to return to one's own country,⁴⁵ is enshrined in Article 12 of the 1966 International Covenant on Civil and Political Rights.⁴⁶ Article 9 of

⁴² See note 136 *infra*.

⁴³ See the subsection "Sanctions" of section V *infra*.

⁴⁴ *Trail Smelter* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1938 & 1941). In this case, the question arose as to whether a state may continue an activity that inflicts legally compensable injury. The United States maintained that "so long as fumigations occur in the State of Washington with such frequency, duration and intensity as to cause injury," the conditions afforded "grounds of complaint on the part of the United States, regardless of the remedial works . . . and regardless of the effect of those works." Letter of the Minister of the United States of America at Ottawa to the Secretary of State for External Affairs of the Dominion of Canada, Jan. 30, 1934, *quoted in id.* at 1962-63. The tribunal found that the U.S. position conformed with the general rules of international law and decided that "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington," in addition to paying for the actual damages. *Id.* at 1966.

⁴⁵ See text at note 37 *supra*.

⁴⁶ Article 12 reads:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre*

the Declaration, which prohibits arbitrary "exile,"⁴⁷ is elaborated upon in Article 3(1) of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national."⁴⁸ These principles, of course, are legally binding upon the signatories to treaties that incorporate them.

The United Nations Charter, as the most universally adhered-to treaty, should be examined for its relevance to the right of refugees to compensation. Article 55 of the Charter provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 further states: "All Members *pledge* themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."⁴⁹

As Professor Quincy Wright pointed out, the word "pledge" indicates the acceptance of an international legal obligation.⁵⁰ His view was confirmed by the International Court of Justice in its Advisory Opinion on *Namibia* of 1971:

Under the Charter of the United Nations, the former Mandatory had *pledged* itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.⁵¹

Thus, all members of the United Nations are legally bound to observe and respect human rights and fundamental freedoms, some of which are spelled

public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Annex to GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

⁴⁷ See text at note 37 *supra*.

⁴⁸ Council of Europe Agreement No. 46: Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Sept. 16, 1963.

⁴⁹ Emphasis added.

⁵⁰ Wright, *The Strengthening of International Law*, 98 RECUEIL DES COURS 1, 182 (1959 III).

⁵¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16, 57 (Advisory Opinion of June 21) (emphasis added).

out in the Charter itself, e.g., the treatment of "all" people "without distinction as to race, sex, language, or religion."

The definition of "refugee," as contained in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, uses the term "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Since "without distinction" is a broader term than "persecution," the latter is a fortiori forbidden under the Charter with respect to "race" and "religion"—the two criteria mentioned in both the Charter and the refugee instruments. Consequently, a state that, directly or indirectly, forces its nationals into becoming refugees on the basis of their "race" or "religion" is in violation of the UN Charter. Persecution on grounds of "race" is additionally forbidden by the 1965 International Convention on the Elimination of All Forms of Racial Discrimination⁵² and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*.⁵³

There remains the question whether persecution on the basis of "nationality, membership of a particular social group or political opinion" is also forbidden under the Charter. To the extent that "nationality" denotes or partakes of the character of "race, color, descent or national or ethnic origin,"⁵⁴ persecution based on those grounds is illegal under the Charter.⁵⁵ If "nationality" means "citizenship,"⁵⁶ then the question would fall under the broader category of treatment of aliens in general—which is beyond the purview of this paper.

As for persecution for "membership of a particular social group or political opinion," although it is a violation of human rights and fundamental freedoms,⁵⁷ it is not explicitly forbidden under the Charter. The case can be made, nevertheless, that under the law of treaty interpretation, such persecution is also forbidden under the Charter.⁵⁸ It is not necessary to dwell on this point here, however, since the right of refugees to compensation is

⁵² 660 UNTS 196.

⁵³ 1015 UNTS 244. Under Article I(1), the states parties to this Convention "declare that *apartheid* is a crime against humanity."

⁵⁴ See Art. 1(1), International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 52.

⁵⁵ See the *Namibia* decision of the International Court of Justice, *supra* note 51.

⁵⁶ The two terms have been used interchangeably in state practice. See, e.g., L. LEE, *supra* note 33, at 168.

⁵⁷ In both the Universal Declaration of Human Rights, *supra* note 37, and the 1966 International Covenant on Civil and Political Rights, *supra* note 46, Article 2 uses the expression "political or other opinion, national or social origin, property, birth or other status."

⁵⁸ Since the United Nations Charter does not spell out all of the contents of human rights, it remains for subsequent instruments, principally the Universal Declaration of Human Rights and the two 1966 International Covenants, that on Civil and Political Rights and that on Economic, Social and Cultural Rights, Annex to GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), to fill in the gaps. For a detailed analysis of the legal status of human rights in the context of the Charter under the Vienna Convention on the Law of Treaties of 1969, see Lee, *The Legal Status of Human Rights Re-Examined*, in 1 *Population and Development: Hearings Before the House Select Comm. on Population*, 59th Cong., 2d Sess. 671, 674-78 (1978).

already established under customary international law, to be discussed in the next section.

Where expulsion of nationals is massive in character,⁵⁹ its illegality and violation of human rights are proportionately compounded. Indeed, mass expulsion may fall under the purview of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide if

committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.⁶⁰

Under the draft articles on state responsibility of the International Law Commission, if large-scale flows of refugees are caused by policies involving genocide or apartheid, these policies would be considered internationally wrongful acts falling under the category of "international crime," with serious legal implications.⁶¹

Customary Law Evidenced by General Assembly Resolutions. We have mentioned that General Assembly Resolution 194 (III) of December 11, 1948, which bases the right of refugees to compensation for loss or damage to their property on "principles of international law" or "equity," has been reaffirmed every year.⁶² But are not General Assembly resolutions mere "recommendations"⁶³ without any binding legal effect on member states?

⁵⁹ Such expulsion may result not only from direct physical coercion, but also from "indirect coercion." The latter may be defined as the deliberate creation of conditions that so violate basic human rights as to leave the people with no choice but to flee from their homelands. See INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, REPORT OF THE WORKING GROUP ON MASS EXPULSION 4 (San Remo, Apr. 16-18, 1983); Remarks by Luke T. Lee, introducing Draft Declaration: Principles of International Law on Mass Expulsion, 78 ASIL PROC. 343 (1984). See also the report of the UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, UN Doc. A/41/324 (1986), para. 26 of which reads:

The element of "coercion" or compulsion was a decisive factor in differentiating the movements to be addressed by a preventive approach from other mass movements outside the scope of the Group's mandate. The Group further held that the term "coercion" or the element of compulsion in this particular case was to be understood in a wide sense covering a variety of natural, political and socio-economic causes or factors which directly or indirectly force the people to flee from their homelands for fear of life, liberty and security or otherwise [emphasis added].

⁶⁰ Art. II, 78 UNTS 277.

⁶¹ See text accompanying note 117 and the subsection "Sanctions" of section V *infra*.

⁶² See *supra* note 16.

⁶³ Article 10 of the United Nations Charter reads:

The General Assembly may discuss any questions on any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and . . . may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters [emphasis supplied].

Actually, a General Assembly resolution is marked by several attributes, of which being recommendatory is but one, albeit an important one. An attribute with important bearing on the subject at hand is restating or progressively developing international law. For the General Assembly may not only restate principles of international law, but also participate actively in their development.⁶⁴ The work of the International Law Commission⁶⁵ and the adoption by General Assembly resolution of many declarations with significant impact on the development of customary international law are cases in point.⁶⁶ Where a resolution restates existing international law, its binding legal force on member states rests not on the resolution qua resolution, but on the declared law, which remains binding on all states, whether or not they voted for that resolution. In its role of progressive development, the resolution contributes to the emergence of new rules by reflecting the views of states.

By characterizing the refugees' right to compensation as being governed "under principles of international law or in equity," Resolution 194 (III) left no doubt about the General Assembly's role in restating existing international law. Repeated and near unanimous recitations of this resolution, reinforced by the doctrine of estoppel, have further strengthened the legal validity of the refugees' right to compensation.⁶⁷ Thus, this right must be

Judge Lauterpacht pointed out that resolutions of the General Assembly are, in general, "in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them." South-West Africa—Voting Procedure, 1955 ICJ REP. 67, 115 (Advisory Opinion of June 7) (Lauterpacht, J., sep. op.). Lauterpacht later referred to "recommendations, properly so called, whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation." *Id.* at 116.

Since the Statute of the UNHCR is but an annex to a General Assembly resolution, it has been argued that it cannot bind states. See Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT'L & COMP. L.Q. 415, 416 (1982). See also Sloan, *Binding Force of a "Resolution" of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1, 31 (1948); Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 *id.* at 97 (1955-56).

⁶⁴ See UN CHARTER art. 13(1)(a).

⁶⁵ See Lee, *The International Law Commission Re-Examined*, 59 AJIL 545 (1965).

⁶⁶ Foremost among these may be mentioned the Universal Declaration of Human Rights, *supra* note 37, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970).

⁶⁷ There is considerable authority for the view that, although individual General Assembly resolutions do not have binding legal force on member states, repeated and near unanimous resolutions may achieve the effect of such binding force through the acceleration of the custom-generating process or through the doctrine of estoppel. From the vast literature, see, e.g., Judge Tanaka's dissenting opinion in *South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.)*, Second Phase, 1966 ICJ REP. 6, 291-93 (Judgment of July 18); Fitzmaurice, *The Older Generation of International Lawyers and the Question of Human Rights*, in *ESSAYS IN INTERNATIONAL LAW IN HONOUR OF D. ANTONIO DE LUNA* 321 (1968); Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 ASIL PROC. 116, 117 (1965); Bin Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?*, 5 INDIAN J. INT'L L. 23,

regarded as having the same legal force as other generally accepted principles of international law, even though it is manifested mainly in General Assembly resolutions.

SCOPE AND CONTENT

The foregoing discussion clearly demonstrates that refugees have a legal right to compensation. Ascertaining the scope and content of that right, however, requires further inquiry.

During the debate on the UK draft resolution that culminated in the adoption of General Assembly Resolution 194 (III), Egypt expressed the view that compensation should cover not only property losses, but also losses of family or political losses. It regarded the entire refugee matter as a test of UN principles.⁶⁸ Syria drew attention to three kinds of loss or damage to property: (1) land and property of those who did not return—to be compensated for by the new possessors; (2) personal property and merchandise which were looted—to be compensated for by the looters; and (3) property destroyed—to be compensated for by those who destroyed the property.⁶⁹

In creating the UN Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, the General Assembly in Resolution 36/148 of December 16, 1981 also “[e]mphasizes the right of refugees to return to their homes in their homelands and reaffirms the right, as contained in its previous resolutions, of those who do not wish to return to receive adequate compensation.”⁷⁰

This 1981 resolution differs from the 1948 resolution in two respects. First, whereas the former specifies compensation only to those who do not wish to return to their homes, the latter calls for compensating both those refugees choosing not to return to their homes and those suffering loss or damage to their property, “which, under principles of international law or in equity, should be made good by the Governments or authorities responsible” (thus including even those who choose to return). Second, although the latter stipulates that compensation should be made for “property” losses, the former mentions merely “adequate compensation”—hence a broader coverage. Be that as it may, since the text of the former is admittedly based on that of the latter, any difference in interpretation should be resolved in favor of the latter.

36 (1965); D. PARTAN, POPULATION IN THE UNITED NATIONS SYSTEM: DEVELOPING THE LEGAL CAPACITY AND PROGRAM OF U.N. AGENCIES 23 (1973); McNair, *The Legality of the Occupation of the Ruhr*, 5 BRIT. Y.B. INT'L L. 35 (1924); I G. SCHWARZENBERGER, INTERNATIONAL LAW 51-52 (3d ed. 1957); Humphrey, Human Rights and World Law (working paper presented at the Abidjan World Conference on World Peace through Law, Aug. 26-31, 1973); MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 476 n.45 (1958); Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AJIL 444, 447 (1969).

⁶⁸ 3 UN GAOR, pt. 1, C.1 (226th mtg.) at 912 (1948).

⁶⁹ *Id.* at 908-09.

⁷⁰ GA Res. 36/148, para. 3 (Dec. 16, 1981).

A pertinent question concerns a refugee's right to compensation for injuries other than property loss suffered in consequence of being made a refugee. By focusing on compensation only "for the property of those choosing not to return and for loss or damage to property,"⁷¹ the General Assembly has refrained from passing judgment on whether countries of origin are obliged to compensate refugees for such other losses as deaths; personal injuries and indignities; wrongful arrest, detention or imprisonment; and emotional or mental anguish. A strong case can be made that such losses should also be compensable; indeed, the Federal Republic of Germany did include among compensable losses the infringement of personal liberty resulting from internment in concentration camps, the interruption of education, and even the humiliation of wearing the yellow star as identification, which was suffered by Jews in all German-occupied countries except France and Italy.⁷²

By stressing "property" losses, however, the General Assembly has trod the more familiar ground of state responsibility for the nationalization or illegal taking of property in general. Refugees specifically seeking compensation for property loss thus enjoy a certain legal advantage over refugees seeking redress for other losses in view of the numerous General Assembly resolutions reaffirming the former right. In addition, property losses lend themselves more readily than other losses to valuation, and are thus more amenable to compensation.

While these General Assembly resolutions strengthen the refugee's hand in seeking to establish a right under customary international law to receive compensation for property, the basic principles underlying such a right apply also to the right of refugees to receive compensation for other aspects of the injury as well.⁷³

IMPLEMENTATION: PROPOSED MEASURES FOR THE UNITED NATIONS

Affirmation or reaffirmation of the right of refugees to compensation under international law is one thing; implementation of such a right is quite another. In view of the absence of international enforcement machinery, implementation may best be effected by giving states incentives to comply

⁷¹ GA Res. 194 (III), para. 11, *supra* note 15.

⁷² See L. LEE, *supra* note 33, at 201-02.

⁷³ See Article V of Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee in 1966:

1. A refugee shall have the right to receive compensation from the State or the Country which he left or to which he was unable to return.
2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of dependants of the refugee or of the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authorities of the State or Country, public officials or mob violence.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, REPORT OF THE EIGHTH SESSION HELD IN BANGKOK FROM 8 TO 17 AUGUST 1966, at 335 (footnotes omitted).

with the law. Such incentives can easily be found if the refugee-generating countries happen also to be developing countries that are interested in receiving developmental assistance from the United Nations and its agencies. General Assembly resolutions may contribute to generating incentives for implementing the refugees' right to compensation, just as in their recommendatory role they may contribute to establishing or reaffirming a right to compensation under customary international law. Three different uses of General Assembly resolutions are illustrated in the following three kinds of implementation measures that might be undertaken mainly through the United Nations.

Controlling Developmental or Other Forms of Assistance

The authority of the General Assembly over UN agencies holds significant potential for enforcing the right of refugees to compensation.⁷⁴ For an in-

⁷⁴ The Charter of the United Nations provides that the staff of the Organization "shall be appointed by the Secretary-General under regulations established by the General Assembly" (Art. 101(1)), and that "[i]n the performance of their duties the Secretary-General and the staff shall not seek or receive instruction from any government or from any other authority external to the Organization" (Art. 100(1)). Furthermore, under Article 17, the General Assembly is given complete control over budgetary matters of the United Nations. Thus, budgetary and other administrative matters of the United Nations, including operational policies and programs, are placed under the authority of the General Assembly and must conform with its resolutions or regulations promulgated pursuant to them. These resolutions dealing with the internal working of the United Nations "have a full 'legal effect' in that they are binding upon both the Members and the organs of the Organization." Johnson, *supra* note 63, at 121. In addition, except for "specialized agencies" like the ILO, UNESCO, the FAO, WHO, the IMF and the World Bank, which are established by intergovernmental agreements and to which the United Nations may only make "recommendations" for the coordination of their activities (Arts. 57, 63 and 64 of the Charter), such functional UN agencies providing technical, economic or other assistance as the UNDP, the UNHCR and UNICEF are also under the basic authority of the General Assembly. Jenks, *Co-ordination in International Organizations: An Introductory Survey*, 28 BRIT. Y.B. INT'L L. 29, 43 (1951). Thus, according to Sloan, *supra* note 63, at 5, "It is a logical inference, confirmed by practice, that resolutions containing terms of reference and other directives are binding upon the *subsidiary* organs of the General Assembly established by it under Article 22 of the Charter."

It suffices to cite the relationship between the General Assembly and one of the subsidiary organs, the UNHCR, as an example. The Statute of the Office of the United Nations High Commissioner for Refugees, *supra* note 17, begins thus: "The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall . . ." (para. 1). Paragraph 3 of the Statute specifically provides: "The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council." In addition, the authority of the General Assembly is spelled out in such other matters as the performance of additional activities by the UNHCR (para. 9), appeals to governments for funds (para. 10), the submission of annual reports (para. 11), the election of the High Commissioner (para. 13), regulations for staff employment (para. 15(c)) and budgetary and financial regulations (paras. 20 and 21). Indeed, the UNHCR has complied with many General Assembly resolutions by assuming functions that fall outside the scope, *stricto sensu*, of the High Commissioner. Such functions include the extension of "good offices" in relation to "uprooted" and "displaced" persons, etc. See, e.g., GA Res. 1388 (XIV) (Nov. 20, 1959); GA Res. 1167 (XII) (Nov. 26, 1957); GA Res. 1959 (XVIII) (Dec. 12, 1963); GA Res. 2598 (XXVII) (Dec. 12, 1972); and GA Res. 3454 (XXX) (Dec. 9, 1975). See also NAGENDRA SINGH, *supra* note 17, at 35-38.

creasingly important function of the United Nations and its agencies is the provision of technical, economic and other developmental assistance to the developing countries upon request. The granting or withholding of such assistance can serve as important leverage to influence the conduct of countries that may generate refugees and are also developing countries. For any decision to grant such assistance should logically take into account not only the merits of project proposals and their priorities in the face of the limited resources of the United Nations and its agencies, but also the record of compliance of the requesting countries with relevant General Assembly resolutions, the Charter of the United Nations and principles of international law.

Thus, in the interest of universal compliance with international law or equity, the General Assembly or a specialized agency may require that no developmental assistance be rendered to a refugee-generating state unless that state has first complied with paragraph 11 of General Assembly Resolution 194 (III), by compensating refugees for the loss of or damage to their property. Since the United Nations and its specialized agencies invariably attach conditions or safeguards to their aid programs—the imposition of some of which, e.g., currency revaluation and import restriction, falls under traditional sovereign prerogatives—the requirement that aid recipients honor principles of international law and human rights in dealing with their own citizens should not be regarded as onerous or unreasonable. Similarly, a donor country may also require compliance with principles of international law and human rights⁷⁵ as a precondition to providing assistance to refugee-generating countries.

Indeed, both the United Nations and individual donor countries would be required under the Riphagen draft “not to render aid or assistance to the State which has committed . . . [an international] crime in maintaining the situation created by such crime.”⁷⁶ Such crime includes the act of generating refugees through genocide, apartheid or other serious and large-scale violations of human rights and fundamental freedoms, and may well include the act of generating refugees *per se*.⁷⁷ The net effect could be a kind of “moratorium” on extending developmental assistance to refugee-

⁷⁵ A case in point is that under U.S. law (§116(a) of the Foreign Assistance Act of 1961, 22 U.S.C. §2151n(a)):

No assistance may be provided . . . to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance would directly benefit the needy people in such country.

The Department of State compiles annual reports under §116(d) (22 U.S.C. §2151n(d) (1982)) and §502B(b) (22 U.S.C. §2304) of the Foreign Assistance Act of 1961, as amended, on individual country human rights practices to assist Congress in considering legislation in the area of foreign assistance. The most recent compilation is published in DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1985, 99th Cong., 2d Sess. (1986).

⁷⁶ See *infra* note 127, Art. 14(2)(b).

⁷⁷ See text at notes 39–41 *supra*.

generating countries—as a means of discouraging the further creation of refugees.

In this connection, a distinction should be made between *developmental* assistance and *disaster-relief* assistance rendered in response to such natural catastrophes as drought, flood and earthquake, or man-made wars and violence. The latter type of assistance is a spontaneous response to an unforeseen emergency requiring instant action—where man's instinctive reaction to come to the aid of his fellow man in distress overrides normal diplomatic, political and economic considerations—whereas the former is a long-term process to raise standards of living through developmental co-operation, which, by definition, requires preconditions and safeguards.

Exercising a Guardianship Function

The Statute of the Office of the United Nations High Commissioner for Refugees, adopted by General Assembly Resolution 428 (V) of December 14, 1950, provides: "The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present statute. . . ."⁷⁸ Of special significance in providing such protection is the power of the High Commissioner to "administer any funds, public or private, which he receives for assistance to refugees" and to "distribute them among the private and, as appropriate, public agencies which he deems best qualified to administer such assistance."⁷⁹ This competence is affirmed by the 1951 Convention Relating to the Status of Refugees⁸⁰ and the 1967 Protocol.⁸¹ The magnitude of the funds received and distributed by the High Commissioner for assistance to refugees is indicated in tables I and II, respectively (see pages 550–51).

The broad and generally accepted power of the High Commissioner to protect and assist refugees makes him guardian of the interests of refugees.⁸² This relationship between the High Commissioner and refugees under the United Nations is closer than that under the League of Nations, which has been characterized as "quasi consular."⁸³

⁷⁸ UNHCR Statute, *supra* note 17, para. 1. ⁷⁹ *Id.*, para. 10.

⁸⁰ *Supra* note 1, Art. 35.

⁸¹ *Supra* note 1, Art. II.

⁸² For the significance of this expression, see text accompanying note 85 *infra*. Thus, "[i]n exercising international protection on behalf of refugees, the international agency asserts the rights of the refugees." Weis, *The Office of the United Nations High Commissioner for Refugees and Human Rights*, 1 HUM. RTS. J. 243, 249 (1968).

⁸³ For example, Resolution (1) of the Arrangement Relating to the Legal Status of Russian and Armenian Refugees, signed June 30, 1928, 89 LNTS 55 (in force for Germany, Belgium, Bulgaria, Estonia, Rumania, Kingdom of the Serbs, Croats and Slovenes and Switzerland), provided for the exercise of the following functions by representatives of the High Commissioner:

- (a) Certifying the identity and the position of the refugees;
- (b) Certifying their family position and civil status, in so far as these are based on documents issued or action taken in the refugees' country of origin;
- (c) Testifying to the regularity, validity, and conformity with the previous law of their country of origin, of documents issued in such country;
- (d) Certifying the signature of refugees and copies and translations of documents drawn up in their own language;

TABLE I

GOVERNMENTAL CONTRIBUTIONS TO UNHCR—1984
(As of February 7, 1985)

Donor	Amount U.S. \$	Percentage of Total Contributions
A. Governments—First 20 Governments:		
1. United States of America	112,477,176	34.45
2. Japan	43,842,680	13.43
3. Germany, Federal Republic of	30,736,177	9.41
4. United Kingdom	18,527,592	5.67
5. Canada	16,083,948	4.93
6. Norway	13,485,613	4.13
7. Sweden	11,296,930	3.46
8. Denmark	9,935,304	3.04
9. Australia	9,154,621	2.80
10. Netherlands	7,980,904	2.45
11. Switzerland	5,831,363	1.79
12. Saudi Arabia	4,220,526	1.29
13. France	2,368,122	0.73
14. Finland	2,229,130	0.68
15. Italy	2,155,263	0.66
16. Oman	716,000	0.22
17. China	700,000	0.21
18. Kuwait	566,316	0.17
19. Belgium	458,941	0.14
20. New Zealand	430,392	0.13
<i>Subtotal</i>	293,196,968	89.79
—Remaining 61 Governments	1,469,742	0.45
B. Inter-Governmental Organizations		
European Economic Community	25,933,643	7.94
C. United Nations System		
	430,176	0.13
D. Non-Governmental Organizations and Other Donors		
	5,510,630	1.69
<i>Total</i>	326,541,189	100.00

SOURCE: DEP'T OF STATE, WORLD REFUGEE REPORT: A REPORT SUBMITTED TO THE CONGRESS AS PART OF THE CONSULTATIONS ON FY-1986 REFUGEE ADMISSIONS 86 (1985).

Crucial to its performance of protecting and assisting refugees is the capacity of the United Nations to bring a claim on their behalf against the source country for failure to compensate them for their losses. Does the United Nations have such a capacity?

(e) Testifying before the authorities of the country to the good character and conduct of the individual refugee, to his previous record, to his professional qualifications and to his University or academic standing;

(f) Recommending the individual refugee to the competent authorities, particularly with a view to his obtaining visas, permits to reside in the country, admission to schools, libraries, etc.

Jennings characterized these functions as "quasi consular." See Jennings, *Some International Law Aspects of the Refugee Question*, 20 BRIT. Y.B. INT'L L. 98, 102 (1989).

TABLE II

UNHCR: 20 LARGEST PROGRAMS

Countries	Refugee Population	Funding* U.S. \$	Refugee Assistance Per Capita	GNP Per Capita
Pakistan	2,800,000	78,817,900	28.15	380
Somalia	700,000	38,565,800	55.09	290
Thailand	169,000	32,565,800	194.41	790
Sudan	637,000	30,159,800	47.35	440
Zaire	301,200	13,950,800	46.32	220
Ethiopia	11,000	13,402,000	1,218.36	140
Honduras	34,000	11,155,900	328.11	660
Philippines	14,600	8,670,700	593.88	820
Iran	1,600,000	8,585,000	5.37
Malaysia	99,200	7,676,000	77.38	1,880
Tanzania	159,000	6,473,100	40.84	280
Indonesia	132,000	6,068,600	45.97	580
Angola	96,200	5,811,700	59.18
China	272,100	5,089,000	18.70	310
Mexico	160,000	4,903,200	30.64	2,270
Vietnam	28,000	4,655,000	166.25
Hong Kong	12,600	4,645,300	368.67	5,340
Djibouti	35,000	4,303,300	122.45	480
Costa Rica	15,000	4,143,200	276.21	1,280
Rwanda	62,000	3,985,000	64.27	260

* 1983 revised estimates. Compiled by the author, June 1984.

In its Advisory Opinion on *Injuries Suffered in the Service of the United Nations*, the International Court of Justice held that the United Nations had the capacity to bring an international claim against a state with a view to obtaining reparation for damage caused to its agent, even though the latter was a national of the defendant state. For, as the Court stated:

The action of the Organization is in fact based not upon the nationality of the victim but upon his *status* as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.⁸⁴

This holding is especially relevant to claims by the United Nations on behalf of refugees since, legally, the latter may remain nationals of their country of origin.

More significantly, the Court affirmed the capacity of the United Nations to bring an international claim against a state for damage caused not only to its "agent," but also "to the interests of which it is the guardian."⁸⁵ Since

⁸⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ REP. 174, 186 (Advisory Opinion of Apr. 11) (emphasis added).

⁸⁵ *Id.* at 180.

the United Nations is the guardian of the interests of refugees, the conclusion is inescapable that it has not only the capacity to bring an international claim against a refugee-generating country on behalf of refugees, but even the duty to do so as a guardian.

Facilitating the Payment of Compensation

A corollary of the rule that General Assembly resolutions dealing with the internal working of the United Nations are legally binding on the United Nations and its members is that the General Assembly may establish machinery for implementing its resolutions. In the case of refugee compensation, such machinery is indispensable because refugees lack the procedural capacity to institute proceedings against their own governments. Hence the creation of the Conciliation Commission for the purpose, *inter alia*, of facilitating the payment of compensation to Palestinian refugees.⁸⁶ Although the intractable conditions in the Middle East have prevented this commission from accomplishing its objectives, there is no intrinsic reason why the General Assembly cannot create a special body to collect, process and distribute compensation funds due refugees worldwide, or assign this task to an existing body. Enhancing the awareness that refugees do have a right to compensation and that the source countries have a corresponding obligation to pay compensation should have a deterrent effect on the future creation of refugees. One way to increase the deterrent effect would be to tabulate and publish the claims of refugees—both satisfied and unsatisfied—for the appropriate use and consideration of UN developmental agencies and other donors.

V. THE RIGHT OF COUNTRIES OF ASYLUM TO COMPENSATION

In discussing the right of countries of asylum to compensation, this paper will deal principally with the mass expulsion of citizens by their own governments. Such expulsions have occurred throughout history⁸⁷ but should be brought to an end for their basic incompatibility with respect for international law and human rights.

The main approach to eliminating mass expulsion is via the "burdens" that the presence of large numbers of refugees inevitably imposes upon countries of asylum. This is not meant to condone the creation of *individual* refugees. Rather, deplorable as the creation of even a single refugee may be, it entails no serious injury to or "burden" on countries of asylum other than a shared outrage at man's inhumanity to man. The United Nations Commission on Human Rights has rightly served as the forum for dispensing corrective measures for this kind of cruelty.

Does persecution by a country of its own citizens *en masse*, forcing them

⁸⁶ GA Res. 194 (III), *supra* note 15.

⁸⁷ A few examples will suffice: the expulsions of Jews from Spain in 1492 and from Bohemia in 1744; the expulsion of Huguenots from France in 1685; the Turkish massacre and expulsion of Armenians in 1915–1916; and the expulsion of over 400,000 Jews from Nazi Germany by 1939. The most recent example is the expulsion of over a million Indochinese, most of whom were of Chinese descent, from Indochina during the last decade. *See* Lee, *supra* note 59, at 342.

to flee abroad as refugees and thus to impose economic, social and other burdens upon other countries, constitute an international wrong, in addition to the compensable wrong vis-à-vis the individual refugees discussed above? What are the legal bases for compensation to these other countries?

LEGAL BASES

Rights and Duties of States

We start with one of the most basic norms of international law, namely, that every state has the *right* to exercise jurisdiction over its territory and over all persons and things within it.⁸⁸ Since right and duty are two sides of the same coin, the corresponding *duty* is to avoid interfering with the exercise by other countries of their respective jurisdiction. Such a duty includes refraining from acts that would cause injury or damage to persons or property situated in the territory of other states.⁸⁹ If a state violates, or is delinquent in its duty toward, the right of other states, international responsibility is incurred. The *Trail Smelter* arbitration is instructive. In this case, the United States sued Canada for damage to land, crops and trees in the state of Washington that had been caused by sulfur dioxide fumes emitted by a Canadian ore-smelting company. The tribunal held Canada "responsible in international law for the conduct of the Trail Smelter" on the grounds that,

under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁹⁰

The tribunal concluded with the statement: "It is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct

⁸⁸ See International Law Commission, Draft Declaration on Rights and Duties of States, Art. 2, [1949] Y.B. INT'L L. COMM'N 287, adopted as Annex to GA Res. 375 (IV), 4 UN GAOR Res. at 67, UN Doc. A/1251 (1949). This norm is implicit in the principle of sovereign equality of states set forth in the Declaration on Principles of International Law concerning Friendly Relations, *supra* note 66. As Marshall, C.J., said in *The Schooner Exchange v. McFaddon*:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

11 U.S. (7 Cranch) 116, 135 (1812). See also Morgenstern, *The Right of Asylum*, 26 BRIT. Y.B. INT'L L. 327, 327 (1949), on the "undisputed rule of international law to the effect that every state has exclusive control over the individuals on its territory."

⁸⁹ "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." C. EAGLETON, note 27 *supra*, at 80. Such a duty would apply a fortiori to the state itself and is inherent in the principle of sovereign equality of states.

⁹⁰ 3 R. Int'l Arb. Awards at 1965.

should be in conformity with the obligation of the Dominion under international law as herein determined."⁹¹

Refugees, of course, are not "fumes."⁹² Nevertheless, certain legal similarities exist: both may cross international boundaries from countries of origin; both such crossings are preventable by the countries of origin; both such crossings are not made with the voluntary consent of the receiving states; and both such crossings may impose economic and social burdens upon the receiving states, for which the countries of origin will be responsible.

A major difference lies in the fact that, while a state cannot prevent fumes from drifting into its air and over its land territories, it can, except perhaps in mass expulsion cases, prevent or deter the entry of refugees into its territories through such devices as barricades, imprisonment or internment ("humanitarian deterrence"), *refoulement*, rejection at the border and "push-offs." The exercise of such power, however, is increasingly being considered as inimical to respect for the minimum standards of humane treatment or human rights, which are epitomized in the Declaration on Territorial Asylum: "No person . . . shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks

⁹¹ *Id.* at 1965-66.

⁹² It has been pointed out that "to compare the flow of refugees with the flow of, for example, noxious fumes may appear invidious; the basic issue, however, is the responsibility which derives from the fact of control over territory." See G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 228 n.49 (1983). Thus, it has been held that the *Trail Smelter* rule extends beyond ecological/pollution damage to any damage to other states. Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L.J. 483, 495 (1985).

For views on the need to balance interests, as opposed to the "strict liability" standard, see Second Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, by Special Rapporteur Robert Q. Quentin-Baxter, in which he stated: "Any tendency to insist that all transboundary harm is wrongful, or automatically compensable in accordance with optimal standards, causes justified alarm and impedes human progress." [1981] 2 Y.B. INT'L L. COMM'N, pt. 1 at 103, 113, UN Doc. A/CN.4/SER.A/1981/Add.1. Thus, while Principle 21 of the Stockholm Declaration upholds *Trail Smelter*, Principle 23 qualifies it as follows:

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, STOCKHOLM, 5-16 JUNE 1972, pt. 1, ch. I (UN Pub. Sales No. E.73.II.A.14). See also Read, *The Trail Smelter Dispute*, 1 CAN. Y.B. INT'L L. 213 (1963); Goldie, *Liability for Damages and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189 (1965); I. BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I)* 49-50 (1983); Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability"*, 80 AJIL 305 (1986).

Regardless of one's position on strict liability vs. interest balancing, one should not lose sight of the actual ruling in the *Trail Smelter* case, which is concerned with the "serious consequence" of transboundary harm, and where the "injury is established by clear and convincing evidence." It would be up to the receiving state to decide initially whether the harmful consequence is indeed "serious" and whether to invoke the procedures set forth in the subsection "Sanctions" in section V *infra*.

asylum, expulsion or compulsory return to any State where he may be subjected to persecution."⁹³

It would be deeply ironic if source states could evade responsibility for their own inhumanity by arguing that states of asylum could avoid their burdens by being equally inhumane.

Sovereign Equality of States

A direct and immediate result of the mass expulsion or persecution of nationals is to force them on the territories of other states as refugees regardless of the wishes of these states. As President Benjamin Harrison underscored in his message to Congress of December 9, 1891:

The banishment, whether by direct decree or by not less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the nature of things, an *order* to enter another—some other. This consideration, as well as the suggestions of humanity, furnishes ample ground for the remonstrances which we have presented to Russia. . . .⁹⁴

Such an "order" to enter another state irrespective of the latter's wishes is a clear violation of one of the basic tenets of international law: the sovereign equality of states.⁹⁵ In addition, it constitutes an "abuse of rights"⁹⁶ since a natural consequence is to saddle the other state with an unwanted population. For even in the exercise of domestic rights, a state must not violate the principle *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another). Thus, Sir John Fischer Williams stated succinctly: "a state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory."⁹⁷ Similarly, the Institut de Droit International, in its *Projet de Règlementation de l'Expulsion des Etrangers*, reported at the September 1891 meeting in Hamburg:

A state cannot, either by administrative or judicial procedure, expel its own nationals whatever may be their differences of religion, race, or national origin. Such an act constitutes a grave violation of international law when its international result is to cast upon other territories

⁹³ Adopted by GA Res. 2312 (XXII), Art. 3(1) (Dec. 14, 1967). See also Nafziger, *The General Admission of Aliens under International Law*, 77 AJIL 805, 847 (1983), where he states that "a state has a qualified duty to admit aliens when they pose no serious danger to its public safety, security, general welfare, or essential institutions."

⁹⁴ Message of the President, 1891 FOREIGN RELATIONS OF THE UNITED STATES, at xiii (emphasis added).

⁹⁵ See UN CHARTER art. 2(1); Declaration on Principles of International Law concerning Friendly Relations, *supra* note 66.

⁹⁶ Jennings, *supra* note 83, at 112; H. LAUTERPACHT, *FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 300-01 (1933).

⁹⁷ Fischer Williams, *Denationalization*, 8 BRIT. Y.B. INT'L L. 45, 61 (1927).

individuals suffering from such a condemnation or even placed merely under the pressure of judicial proscription.⁹⁸

Principle of Nationality

When a state expels its own citizens, it undermines the very foundation on which relations among states and between states and their citizens are built. As early as 1758, Vattel defined nationality as "the bond which ties a state to each of its members."⁹⁹ Over the centuries, nationality has provided the legal link between the state and the individual, whether at home or abroad.¹⁰⁰ Thus, in the *Panevezys-Saldutiskis Railways Case*, the Permanent Court of International Justice observed: "in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection."¹⁰¹ In the *Nottebohm Case*, the International Court of Justice defined nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of *reciprocal rights and duties*."¹⁰² The unilateral termination of such rights and duties would incur responsibility if, as Professor Brownlie emphasized, "it were shown that the withdrawal of nationality was itself a part of the delictual conduct facilitating the result."¹⁰³

International law does permit denationalization in certain circumstances. However, states are prohibited from manipulating their competence in this regard so as to avoid their international obligations.¹⁰⁴

Quasi-Contractual Relationship

The burden of providing refugees with goods and services—of serving basic human needs that must be met for their survival, settlement or assim-

⁹⁸ 11 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE 278-79, Art. XI (1891). See also Règles Internationales sur l'Admission et l'Expulsion des Etrangers, adopted by the Institut on Sept. 12, 1892, 12 ANNUAIRE at 219 (1892).

⁹⁹ E. DE VATTEL, LE DROIT DES GENS, Préliminaires, para. 1 (1758); R. PLENDER, INTERNATIONAL MIGRATION LAW 4 (1972).

¹⁰⁰ L. LEE, *supra* note 33, *passim*.

¹⁰¹ (*Estonia v. Lithuania*), 1939 PCIJ, ser. A/B, No. 76, at 16 (Judgment of Feb. 28). Earlier, the Court ruled in the *Mavrommatis Palestine Concessions (Greece v. UK)* case:

It is an elementary principle of international law that a State is entitled to protect its subjects. . . . By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

1924 PCIJ, ser. A, No. 2, at 12 (Judgment of Aug. 30).

¹⁰² *Nottebohm Case (Liechtenstein v. Guat.)*, Second Phase, 1955 ICJ REP. 4, 23 (Judgment of Apr. 6) (emphasis added).

¹⁰³ I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 396 (3d ed. 1979).

¹⁰⁴ Goodwin-Gill, *The Limits of the Power of Expulsion in Public International Law*, 47 BRIT. Y.B. INT'L L. 55, 57 (1974-75). Professor Brownlie observed that deprivation of nationality is normally provided for in municipal law in cases where residence and acts of allegiance have occurred abroad. I. BROWNLIE, *supra* note 103, at 404 n.3.

ilation—falls on the countries of asylum. Their assumption of that burden may be required by international law and domestic law. For example, Article 23 of the 1951 Convention Relating to the Status of Refugees provides: "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals."¹⁰⁵

The social or public welfare laws of many countries require that certain minimum services be provided to all people within their territories regardless of citizenship or residence status. A case in point is the 1982 decision of the U.S. Supreme Court that children who are illegal aliens have a constitutional right to free public education. It reaffirmed the rulings of two lower courts that a 1975 Texas statute barring such children from the public schools was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. The Court declared that the protection of the Fourteenth Amendment "extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory."¹⁰⁶

Since refugees are, by definition, those forced to leave their countries by their own governments, a quasi-contractual relationship exists between their governments and those of the countries of asylum. Any attempt at defining a quasi contract would fill pages.¹⁰⁷ For our purpose, perhaps the illustration given by Corbin would be the best way: "Under compulsion of law, . . . A makes payment of money that it was B's legal duty to pay. In spite of any express refusal, B is under a quasi contractual duty to reimburse A."¹⁰⁸

The law referred to above includes, for example, the United Nations Charter,¹⁰⁹ which is binding on all member states, and the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol,¹¹⁰ which are binding on 97 states. By transforming citizens into refugees abroad, and thus shifting the burden of their care and maintenance to the country of asylum, the source country creates a quasi-contractual relationship with the country of asylum, which must be reimbursed by it for the costs. In this regard, it is significant that the report of the Committee on International Assistance to Refugees, presented to the Council of the League of Nations on June 20, 1936, stated: "In view of the heavy burden placed on the countries of refuge, the Committee considers it an international duty for the countries of origin of the refugees at least to alleviate to some extent, the

¹⁰⁵ See note 1 *supra*. The same national treatment is also accorded to refugees in rationing (Art. 20), elementary education (Art. 22), etc. *Id.*

¹⁰⁶ *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

¹⁰⁷ See generally CORBIN ON CONTRACTS §19 (1963); Corbin, *Quasi Contractual Obligation*, 21 YALE L.J. 533 (1912); CLARK ON CONTRACTS (4th ed. Throckmorton & Brightman, 1939). Quasi contract may be defined as "an obligation which law creates in absence of agreement; it is invoked by courts where there is unjust enrichment." Its function is "to raise obligation in law where in fact the parties made no promise, and it is not based on apparent intention of the parties." BLACK'S LAW DICTIONARY 1120 (5th ed. 1979).

¹⁰⁸ 1 CORBIN ON CONTRACTS, *supra* note 107, at 47-48.

¹⁰⁹ Arts. 55 and 56. For the texts, see text at note 49 *supra*.

¹¹⁰ See note 105 *supra* and accompanying text.

burdens imposed by the presence of refugees in the territory of other states."¹¹¹ Commenting on this recommendation, Jennings wrote in 1939: "If the conduct of the state of origin be in the first place illegal, it seems to follow that it is under a duty to assist settlement states in the solution of the problem to which it has given rise."¹¹²

Indirect Responsibility

It bears emphasizing that a refugee-generating country is obligated to reimburse the country of asylum for the costs of caring for refugees it generated not only directly, but also indirectly; for example, through actual or threatened military intervention in the internal affairs of a state resulting in the flight of the latter's citizens for fear of persecution. Article 28 of the draft articles on state responsibility (part 1) expresses this obligation well:

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the responsibility of that other State.
2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.
3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act.¹¹³

In its commentary, the Commission expressed the opinion

that a State which commits an internationally wrongful act under coercion by another State is in fact in a situation similar to that of a State which in one area of its activity is subject to the direction or control of another State. Since in this latter case the State is not acting in the free exercise of its sovereignty, it is not acting with complete freedom of decision and action. The coercing State compels the other State to take the course of committing an international offence which in other circumstances it would probably not commit.¹¹⁴

Thus, the notion of coercion here, according to the Commission, might be even broader in scope than that underlying Article 52 of the Vienna Convention on the Law of Treaties concerning the invalidity of treaties concluded under the threat or use of force.¹¹⁵

Assuming that Article 28 of the draft articles on state responsibility reflects customary international law, the pertinent question may be asked: If the presence of some 2,500,000 and 780,000 Afghan refugees in Pakistan and

¹¹¹ League of Nations Doc. C.2 M.2 1936 XII, quoted in Jennings, *supra* note 83, at 113.

¹¹² Jennings, *supra* note 83, at 113.

¹¹³ For text and commentary, see [1979] 2 Y.B. INT'L L. COMM'N, pt. 2 at 94-106, UN Doc. A/CN.4/SER.A/1979/Add.1.

¹¹⁴ *Id.* at 102.

¹¹⁵ UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), reprinted in 63 AJIL 875 (1969).

Iran, respectively, could be attributed to the Soviet politico-military intervention in Afghanistan, could the two asylum countries claim compensation from the USSR for the refugee burden thrust upon them? Providing that such a causal relationship could indeed be established, the answer would appear to be that Pakistan and Iran could justifiably claim compensation from the USSR and invoke the procedures outlined in the subsection entitled "Implementation" below.

State Responsibility

In its role as a codifier of international law—restating or synthesizing existing rules of customary international law—the International Law Commission cannot, of course, provide new legal bases for the right of countries of asylum to compensation. However, in its work on the progressive development of international law, which is generally inseparable from codification,¹¹⁶ the Commission can influence the modification of existing rules or the development of new ones. In this regard, its work on state responsibility may contribute to or strengthen the legal bases of the right of countries of asylum to compensation through its clarification of the concept of and responsibility for an "internationally wrongful act."

On the basis of some of the theories expounded above, the draft articles on state responsibility (part 1) prepared by the International Law Commission classify "internationally wrongful acts" into "international delicts" and "international crimes," which entail different legal consequences for the states that commit them. Article 19 of the draft articles provides:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*.

¹¹⁶ Lee, *supra* note 65, at 556; Lauterpacht, *Codification and Development of International Law*, 49 AJIL 16, 29 (1955); Rosenne, *The International Law Commission, 1949-59*, 36 BRIT. Y.B. INT'L L. 104, 142-44 (1960); Brierly, *The Future of Codification*, 12 *id.* at 3 (1931); Jennings, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law*, 13 INT'L & COMP. L.Q. 385, 386 (1964); 2 UN GAOR Annex 1 at 178, UN Doc. A/331 (1947).

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.¹¹⁷

Thus, if refugee flows result from acts of genocide, apartheid or other serious and large-scale violations of human rights and fundamental freedoms, such acts would constitute "international crimes." If the flows result from other "internationally wrongful acts," the latter would constitute "international delicts." The legal consequences of both kinds of acts will be discussed in the section entitled "Sanctions" below. Classification of the acts in this way would heighten public awareness of the legal nature and consequences of creating refugees, and thus would contribute to preventing new massive flows of refugees.

IMPLEMENTATION

Protests

The first step to be taken by a country of asylum wishing to implement its right to compensation for inflows of refugees is to lodge a protest to the country of origin.¹¹⁸ It is no coincidence that the International Court of Justice, in its Advisory Opinion on *Injuries Suffered in the Service of the United Nations*, listed "protest" as the first among "customary methods recognized by international law for the establishment, the presentation and the settlement of claims."¹¹⁹ For failure to lodge timely protests may well be taken to signify acquiescence.¹²⁰ A few examples of such protests follow.

Toward the end of the 19th century, persecution in Russia of the Jewish minority resulted in an influx of destitute Russian Jews into the United States. The U.S. Government not only protested against Russia's persecution of Jews on humanitarian grounds, but also contended that the interests of

¹¹⁷ See Draft Articles on State Responsibility, Part I, adopted on first reading by the International Law Commission, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 30, UN Doc. A/CN.4/SER.A/1980/Add.1. For commentary on this article, see [1976] 2 *id.*, pt. 2 at 95-122, UN Doc. A/CN.4/SER.A/1976/Add.1.

¹¹⁸ Although "protest" is generally considered an effort to achieve pacific settlement of disputes, it is not included as one of the means for such settlement under chapter VI of the Charter of the United Nations. Hence, it is treated separately here.

¹¹⁹ 1949 ICJ REP. at 175.

¹²⁰ Cf. Reisman, *The Regime of Straits and National Security: An Appraisal of International Law-making*, 74 AJIL 48, 57 (1980). On the inference of acquiescence from failure to protest, see MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143, 172 (1954); MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 *id.* at 293 (1953); MacGibbon, *Customary International Law and Acquiescence*, 33 *id.* at 115 (1957); O'Connell, *Mid-Ocean Archipelagos in International Law*, 45 *id.* at 1, 60-69 (1971); K. WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 44-45 (1964); [1950] 1 Y.B. INT'L L. COMM'N 4-5, UN Doc. A/CN.4/SER.A/1950; Lee, *The Law of the Sea Convention and Third States*, 77 AJIL 541, 559-60 (1983). For the view that "a failure to protest might manifest no acquiescence but a belief that the usage was simply outside the legal realm, belonging to the realm of social courtesy or comity," see A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 107-08 (1971).

the United States were injured by the ensuing disproportionate migration.¹²¹ In the 1891 message to Congress of President Harrison mentioned above, he said:

By the revival of antisemitic laws, long in abeyance, great numbers of those unfortunate people have been constrained to abandon their homes and leave the empire. . . . The immigration of these people to the United States—many other countries being closed to them—is largely increasing and is likely to assume proportions which may make it difficult to find homes and employment for them here and to seriously affect the labor market. It is estimated that over one million will be forced from Russia within a few years.¹²²

After World War I, the German Government protested against France's expulsion of ethnic Germans from the Rhine region of Alsace-Lorraine. It characterized such "mass expulsion, which arbitrarily and suddenly deprives hundreds of nationals of a state of the means of existence" as "contrary to all prescriptions of international law and all considerations of justice and humanity."¹²³ Ironically, Germany was to expel its own ethnic Jews by the hundreds of thousands immediately before World War II.¹²⁴

The aftermath of widespread disorders in East Pakistan that culminated in the Indo-Pakistan war and the establishment of Bangladesh was a massive influx of refugees from East Pakistan to India. In a note to the Pakistan High Commission in Delhi on May 14, 1971, the Indian Government stated:

As a result of the military action taken by the Government of Pakistan in East Bengal, nearly 2,000,000 Pakistanis have been forced to flee from their homes and to take shelter in adjoining areas of India. This deliberate expulsion of such a large number of people from their homes has created a human problem of unparalleled magnitude which is capable of producing serious repercussions in the area, leading to a threat to peace in the region. . . .

The Government of India therefore hold the Government of Pakistan fully responsible for creating such conditions forthwith as would facilitate the return of these refugees to their homes. . . . At the same time the Government of India reserve the right to claim from the Government of Pakistan full satisfaction in respect of additional financial and other burdens that the Government of India have had to shoulder for affording relief to these Pakistani nationals.¹²⁵

¹²¹ S. GOLDSCHMIDT, *supra* note 24, at 47.

¹²² Message of the President, *supra* note 94, at xii.

¹²³ *Le Temps*, Aug. 14, 1922, at 2, *quoted in* O. JANOWSKY & M. FAGEN, *INTERNATIONAL ASPECTS OF GERMAN RACIAL POLICIES* 54 (1937).

¹²⁴ De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 243 (1975). Nevertheless, the Federal Republic of Germany after the war undertook to compensate Jewish refugees for their loss of property and for the various indignities they suffered. *See* L. LEE, *supra* note 33, at 201-02; G. BLESSIN, H.-G. EHRING & H. WILDEN, *supra* note 33.

¹²⁵ KEESING'S CONTEMPORARY ARCHIVES, July 3-10, 1971, at 24,685. The number of refugees subsequently rose to 9,899,305. *See* statement of R. K. Khadilkar, the Indian Minister of Labor and Rehabilitation, on Dec. 30, 1971, *id.*, Feb. 19-26, 1972, at 25,112.

Each of these protests signifies that "a strict right rather than a mere courtesy has been violated,"¹²⁶ although in none of these cases were follow-up measures adopted to right the wrong.

Article 6 of the Fifth Report on the Content, Forms and Degrees of State Responsibility (Part Two of the Draft Articles), by Special Rapporteur Willem Riphagen,¹²⁷ provides a useful guide as to what might, in a protest, be "required" of the state that has committed an internationally wrongful act:

- (a) to discontinue the act;
- (b) to apply remedies provided under the municipal law;
- (c) to restore the situation to that which existed prior to the act;
- (d) to pay adequate compensation in the event of the impossibility of the restoration of the pre-existing situation; and
- (e) to provide appropriate guarantees against the repetition or recurrence of the act.

To be credible, the protestor must follow up its protest with enforcement measures if the protest is ignored. What might such measures be that the protestor could legitimately employ?

Pacific Settlement of Disputes

If protests are ignored, recourse may be had to the means employed in the pacific settlement of disputes, as provided by chapter VI of the United Nations Charter. Thus, the states of origin and asylum should seek, first of all, a solution by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement,"¹²⁸ resort to regional agencies or arrangements, or other peaceful means of their own choice."¹²⁹ As a final resort, they may turn to the International Court of Justice for adjudication under the "optional clause,"¹³⁰ if applicable, or by special agreement.¹³¹ Article 36(3) of the Charter specifically assigns to the Court the lead role in resolving "legal disputes" that in essence concern, inter alia, "the nature or extent of the reparation to be made for the breach of an international obligation."¹³²

Chapter VI of the Charter provides the ideal mechanism and procedure for resolving disputes over compensation issues, including the fixing of the amount of compensation, unless, of course, in the final analysis, the contentious jurisdiction of the International Court of Justice does not apply. Article 10 of the Riphagen draft states specifically that an injured state may not resort to reprisal "until it has exhausted the international procedures for peaceful settlement of the dispute available to it."¹³³

¹²⁶ J. McKENNA, *DIPLOMATIC PROTEST IN FOREIGN POLICY* 16 (1962).

¹²⁷ Fifth Report on State Responsibility, UN Doc. A/CN.4/380 and Corr.1 (1984).

¹²⁸ In view of the specific role assigned to the International Court of Justice in Article 36(3) of this chapter, the term "judicial settlement" here should be interpreted as excluding resort to that Court in this initial phase of seeking a solution.

¹²⁹ UN CHARTER art. 33(1).

¹³⁰ Art. 36(2)-(6) of the Statute of the International Court of Justice.

¹³¹ *Id.*, Art. 36(1).

¹³² *Id.*, Art. 36(2)(d).

¹³³ Fifth Report on State Responsibility, *supra* note 127, Art. 10.

Sanctions

In the event that the pacific settlement of disputes fails, for example because the International Court of Justice lacks jurisdiction, the injured state would, under the Riphagen draft, be "entitled, by way of reprisal, to suspend the performance of its . . . obligations towards the State which has committed the internationally wrongful act,"¹³⁴ subject to the principle of proportionality.¹³⁵ Reprisals on this basis might include economic sanctions, e.g., the suspension of treaties of trade or consular rights, or the revocation of most-favored-nation treatment.

If the source state has committed an "international crime," that is, a crime *erga omnes*,¹³⁶ the appropriate response should be made by the international community as a whole. Thus, in addition to permitting the right of reprisal, Article 14(2) of the Riphagen draft provides the following:

An international crime committed by a State entails an obligation for every other State:

- (a) not to recognize as legal the situation created by such crime; and
- (b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and
- (c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

The discharge of the obligation under Article 14(2) is "subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security."¹³⁷ This provision has been interpreted as conferring exclusive jurisdiction upon "the UN organs as the sole representative of the international community with regard to possible reactions by States to the commission of an international crime."¹³⁸ Accordingly, the competent UN organs might decide to suspend economic or developmental assistance to the state committing an international crime, or to call on member states to do so, or both. Subject to Article 103 of the United Nations Charter, a decision made pursuant to such an obligation would prevail over the rights and obligations of a state under any other rule of international law in the event of a conflict.¹³⁹

Reimbursement of the United Nations

Since in many countries the United Nations, mainly through the UNHCR and the United Nations Relief and Works Agency (UNRWA),¹⁴⁰ has assisted

¹³⁴ *Id.*, Art. 9(1).

¹³⁵ *Id.*, Art. 9(2).

¹³⁶ *Id.*, Art. 5(e).

¹³⁷ *Id.*, Art. 14(3).

¹³⁸ Hofmann, *supra* note 29, at 711.

¹³⁹ Fifth Report on State Responsibility, *supra* note 127, Art. 14(4).

¹⁴⁰ The UN Relief and Works Agency for Palestine Refugees in the Near East was established pursuant to General Assembly Resolution 302 (IV) of Dec. 8, 1949. Unlike the UNHCR, which provides both assistance and protection to refugees worldwide other than those in Palestine, the UNRWA provides only *assistance* to Palestinian refugees, mostly in such areas as health, nutrition, education and housing. See, e.g., Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 37 UN GAOR Supp. (No. 13), UN Doc. A/37/13 (1982).

in the care and maintenance of refugees, may the United Nations claim reimbursement from countries of origin for expenditures incurred? An affirmative answer to this question would provide redress, at least in part, for any procedural incapacity of countries of asylum to obtain reimbursement from countries of origin through the pacific settlement of disputes. For affirmation of a UN right to claim reimbursement would enable the United Nations to expand its role in assisting refugees and would correspondingly reduce the expenditures of countries of asylum.

Note should be taken of the role of the United Nations as the guardian of the interests of refugees (discussed in section IV above). This role confers upon the United Nations the capacity to bring an international claim against a state with a view to obtaining reparation in respect of damage "to the interests of which it is the guardian."¹⁴¹ Although the subsection on guardianship deals primarily with compensation for the refugees' interests in "property,"¹⁴² there is no reason why the interests could not include daily necessities to sustain life such as food, shelter, clothing and health care. Thus, the same rationale entitling the United Nations to bring an international claim for compensation for loss or damage to refugees' property applies also to compensation or reimbursement for goods and services rendered to refugees.

Notwithstanding the concurrent right of countries of asylum and the United Nations to claim reimbursement for expenses incurred for the care and maintenance of refugees, voluntary contributions to the United Nations for such agencies as the UNHCR and UNRWA continue to be useful in making revolving funds available¹⁴³ to assist new refugees pending reimbursement by the country of origin, providing a kind of "insurance" against "bad debts" and integrating refugee assistance into development.¹⁴⁴

VI. CONCLUSION

A paper of this sort inevitably invites speculation about its practicability: How realistic is it to expect the right to compensation to come to fruition? Might our arguments not be an exercise in futility?

To a certain degree, such skepticism accompanies the development of any rule of international law. For each rule must be conceived, refined, nurtured, tested and subsequently accepted or acquiesced in by all states. Anywhere along the way, a proposed rule could be torn asunder or reduced to abstract theory.

Yet many rules have survived the baptism of fire, maturing into state practice and positive law. A case in point is the development of the concept

¹⁴¹ See *supra* note 85 and accompanying text.

¹⁴² See text accompanying note 15 *supra*.

¹⁴³ For the proposed establishment of a UNHCR Fund for Durable Solutions, see Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/569 (1979).

¹⁴⁴ Note on the Establishment of a Fund for Durable Solutions, Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/583 (1980); Garvey, *supra* note 92, at 498-99.

of "strict liability" for acts that produce harmful extraterritorial effects in the peaceful use of nuclear energy, a relatively recent technological innovation. This concept is based on such broad principles of international law as the rights and duties of states and the sovereign equality of states—the same principles that constitute some of the legal bases for the right of countries of asylum to compensation.¹⁴⁵ Just as the Federal Republic of Germany decided to compensate Jewish refugees for their property loss and personal suffering¹⁴⁶ in the absence of any treaty specifically requiring it to do so, so the countries causing nuclear mishaps undertook to compensate victims on the basis of the *de facto* or implied acceptance of strict liability.¹⁴⁷ In time, the principle of strict liability came to underlie all treaties pertaining to the peaceful use of nuclear energy: the 1960 OECD Convention on Third Party Liability in the Field of Nuclear Energy,¹⁴⁸ the 1962 Brussels Convention on the Liability of Operations of Nuclear Ships,¹⁴⁹ the 1963 Convention on Civil Liability for Nuclear Damage¹⁵⁰ and the 1972 Convention on International Liability for Damage Caused by Space Objects.¹⁵¹

Thus, although any attempt at holding a country liable for generating

¹⁴⁵ See text at notes 88–98 *supra*.

¹⁴⁶ See text at note 33 *supra*.

¹⁴⁷ The cases of the "Lucky Dragon" and the "lost bomb" in Spain may be cited. In the former, the Japanese tuna trawler *Fukuryu Maru* was, on Mar. 14, 1954, at a distance of about 80 miles off Bikini when the radioactive fallout of the Mar. 1 explosion by the United States blanketed it. All 23 crew members suffered from exposure to radiation requiring hospitalization and one of them died subsequently. In addition to human injuries, over four thousand pounds of the trawler's tuna catch was ordered buried by the Japanese sanitary authorities. Some export industries connected with fish meat products were also affected by the increasing number of radioactive fish caught. The U.S. Government subsequently tendered to the Japanese Government *ex gratia* and "without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained" by Japanese nationals as a result of the thermonuclear tests. See Note Regarding Bikini Claims, 32 DEP'T ST. BULL. 90–91 (1955).

In the "lost bomb" case, a collision in January 1966 between a B-52 jet bomber and a KC-135 refueling tanker, both belonging to the United States, resulted in the fall on Palomares, Spain, of three of the H-bombs and flaming debris. The TNT charges in two of the bombs exploded on impact, scattering uranium and plutonium particles and dust, while the third bomb remained intact and a fourth was found 2,500 feet below sea level, 5 miles offshore. In decontaminating Palomares, the U.S. Air Force had to destroy some crops, impound others, and bury some 1,750 tons of mildly radioactive soil elsewhere. Hundreds of acres of fields were closed to harvesting and cultivation for nearly 2 months, business came to a standstill in Palomares and nearby fishing villages, and traces of contamination were found among those working around the bomb wreckage. While secrecy prevailed over the number and types of claims presented, the amounts actually paid and the formula applied in determining compensation, a rough guess was that more than \$200,000 was paid under the provisions of the Foreign Claims Settlement Act. See Lee, *The Legality of Nuclear Tests and Weapons*, 18 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 307, 312–13 (1968).

¹⁴⁸ Signed July 29, 1960, OEEC Doc. C (60) 93 (Final Text), Art. 3, reprinted in 55 AJIL 1082 (1961).

¹⁴⁹ Signed May 25, 1962, reprinted in 57 AJIL 268 (1963), Art. 2.

¹⁵⁰ Signed May 21, 1963, INTERNATIONAL ATOMIC ENERGY AGENCY, OFFICIAL RECORDS 497–514, Arts. 2 and 4 (Legal Series No. 2, 1964).

¹⁵¹ Signed Mar. 29, 1972, 24 UST 2389, TIAS No. 7762, 610 UNTS 187, Art. II.

refugees and at meting out appropriate sanctions may appear unrealistic at first sight, its prospects for success should not be underestimated, anchored as it is in generally accepted principles of international law. Indeed, during the 1985 session of the General Assembly, Singapore stressed that if the root causes of refugee flows were to be tackled in an effective manner, there must be a firm resolve to increase the political and economic cost to refugee-generating countries through the imposition of appropriate sanctions.¹⁵² What could be a more fitting sanction than requiring countries of origin to pay compensation to refugees and countries of asylum? In addition to serving the end of justice, such a sanction would inevitably have a deterrent effect. Such is the purpose and function of law.

The prospects for putting the compensation theory into effect have been even more encouraging since the completion of Special Rapporteur Riphagen's fifth report on state responsibility (part 2) in 1984.¹⁵³ Although these articles await finalization by the Commission, the majority of its members appear to agree on their general structure.¹⁵⁴ Their eventual transformation into treaty law can only strengthen the rule of law.

In conclusion, a few other observations ought to be made. There is, in general, an inverse relationship between voluntary repatriation and compensation; namely, the greater the opportunity for refugees to be repatriated, the less the need for compensation, and vice versa. Thus, stressing the refugees' right to compensation may well induce the country of origin to create conditions conducive to voluntary repatriation. In so doing, the country of origin would also be involved in treating the root causes of the refugee problem. For the creation of conditions conducive to the return of refugees would remove or ameliorate the very conditions that gave rise to refugees in the first place, foremost among which are violations of human rights and international law by the countries of origin themselves. It is time to apply treatment to the *causes* of the malady,¹⁵⁵ and not just its *symptoms*.

Although the findings in this paper apply to all refugee-generating situations—past, present and future—emphasis should be placed on their deterrent effect on the future generation of refugees.¹⁵⁶ For it is far better to prepare a solid foundation for a future refugeeless world than to bicker about who owes what to whom for events past. The legal principles underlying the right to compensation and the possible implementing mechanisms have been set forth above. It remains to be seen whether the United Na-

¹⁵² 40 UN GAOR Special Political Comm. (10th mtg.) at 11–12, UN Doc. A/SPC/40/SR.10 (1985).

¹⁵³ See *supra* note 127.

¹⁵⁴ See Statement of Special Rapporteur Riphagen, [1984] 1 Y.B. INT'L L. COMM'N 317, UN Doc. A/CN.4/SER.A/1984. See also Hofmann, *supra* note 29, at 709.

¹⁵⁵ Lee, *The UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*, 78 AJIL 480 (1984).

¹⁵⁶ This future-oriented approach is in line with that adopted by the UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees. *Id.* at 483.

tions¹⁵⁷ and the world community can muster the will to translate these principles into reality.

¹⁵⁷ "An international agency can by its nature employ only amicable means [to protect refugees]. It is essentially a moral authority whose methods must be persuasive rather than coercive." Weis, *supra* note 82, at 249.

So long as the objective of the UNHCR remains "humanitarian" and "entirely non-political," and so long as its means remain "amicable" and "persuasive," an organ other than the UNHCR must be found and entrusted with the mandate of fulfilling the right of refugees and countries of asylum to compensation. In this regard, note should be taken of a proposed designation of a "special representative for international co-operation to avert new massive flows of refugees" by the Secretary-General during the discussion of the UN Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees. UN Doc. A/AC.213/1985/WP.5, ch. V-B-g (1985).

"SECRET WARS," SELF-DEFENSE AND THE CHARTER—A REPLY TO PROFESSOR MOORE

By James P. Rowles*

In a recent article entitled *The Secret War in Central America and the Future of World Order*,¹ Professor John Norton Moore, a staunch defender of United States actions toward Nicaragua, sets forth a comprehensive array of factual assertions and legal arguments to support his conclusions that support by the United States of Nicaraguan counterrevolutionaries or "contras" and its own actions against Nicaragua are justified as collective self-defense under international law. He also presents arguments to support his conclusion that the International Court of Justice has so exceeded its authority in exercising jurisdiction in the case of *Nicaragua v. United States* that its decisions are void, and consequently may be ignored by the United States—or, for that matter, Nicaragua. Professor Moore's analysis and conclusions differ sharply from those of the present writer. It should therefore be useful to identify the main points of disagreement, and to suggest the policy implications of the different legal arguments and conclusions.

I. COLLECTIVE SELF-DEFENSE

The basic principles contained in Article 2(4) of the United Nations Charter, Articles 18 and 20 of the OAS Charter, other conventions and customary international law appear to prohibit the actions the United States has undertaken, both directly and through its support of the contras, against the territorial integrity and political independence of Nicaragua. These provisions are familiar to the readers of the *Journal*, are likely to be discussed at length in the International Court of Justice's judgment on the merits and require no further detailed treatment here. An important exception to these prohibitions, of course, is the right of individual or collective self-defense recognized by Article 51 of the United Nations Charter. In Professor Moore's view, U.S. actions against Nicaragua constitute valid measures of self-defense. This conclusion merits careful examination.

Moore's argument that United States actions against Nicaragua are legally justified rests on three basic propositions. The first is that arms shipments and other assistance provided by Nicaragua to the guerrillas in El Salvador constitute an "armed attack" within the meaning of that term as used in

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¹ Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43 (1986).

Article 51 of the UN Charter.² Second, he argues that U.S. support of the contras and other military and paramilitary actions against Nicaragua have been taken in exercise of the right of collective self-defense under Article 51, in response to a request for such assistance from El Salvador. Finally, Moore argues that U.S. actions against Nicaragua meet the remaining requirements for the lawful exercise of that right, including the requirement of proportionality.

First, the argument that Nicaragua is engaged in a continuing armed attack against El Salvador is based on the factual assertions that Nicaragua provided large quantities of arms to the guerrillas in El Salvador beginning in September or October of 1980,³ and that while the level of shipments of arms has diminished since 1981,⁴ or 1982–1983,⁵ they nonetheless continue,⁶ as do shipments of ammunition and explosives.⁷ In addition, Moore cites evidence tending to show that Nicaragua continues to allow the use of com-

² *Id.* at 58, 60, 86–87. He also suggests that Nicaragua has launched "armed attacks" against Costa Rica, Guatemala and Honduras by supporting subversive activities in those countries. *See, e.g., id.* at 86–87. Aside from Nicaraguan attacks on contra bases in Honduras, such alleged "armed attacks" need not be considered here in view of the fact that the strongest case that can be made, by far, is that involving the alleged Nicaraguan "attack" on El Salvador, and that only El Salvador appears to have requested U.S. assistance in meeting such an armed attack by providing measures of collective self-defense. Even if his factual assertions regarding Nicaraguan subversion in Guatemala, Honduras and Costa Rica are accurate—a question that admits of some doubt in view of the sources Moore relies on regarding some incidents—these activities cannot reasonably be construed as representing ongoing "armed attacks" against the countries concerned. This point becomes clearer when we examine the strongest case, that involving the alleged "armed attack" on El Salvador by Nicaragua. (The use of "armed attack" should be understood as referring to that term as it is used in Article 51 of the UN Charter.)

The argument that activities directed against four neighboring states, none of which amounts to an armed attack against any single state, might, taken together, be considered an armed attack against all, is clearly untenable in both logic and law. Although Moore does not explicitly advance such a proposition, arguing instead that Nicaragua's activities against each constitute an armed attack, the argument is largely implicit in his reasoning. The argument must be rejected on legal grounds because it would eliminate the armed attack requirement contained in Article 51 of the UN Charter. The inadmissibility of such a legal argument, moreover, is supported by the same policy considerations that militate in favor of upholding the requirement of an armed attack before a state may lawfully resort to the use of force in exercise of the right of self-defense under Article 51. *See infra* note 45 and accompanying text.

Moore, arguing in the alternative, also states that the view espoused by some scholars that Article 51 does not restrict the right of self-defense under customary international law, as it existed prior to the advent of the Charter, "seems correct." Moore, *supra* note 1, at 82–83. This is not the view of the majority of publicists. Ago states, for example: "Suffice it to say that the plea of self-defense in justification of the use of armed force by a State in cases other than those in which the State in question is the victim of an armed attack is held by the majority to be utterly inadmissible." Ago, Addendum to the Eighth Report on State Responsibility, [1980] 2 Y.B. INT'L L. COMM'N, pt. 1 at 13, 66, UN Doc. A/CN.4/SER.A/1980/Add.1. The quoted statement is made in a context that makes clear that Ago does not mean to exclude the right of collective self-defense. His report contains exhaustive references to the literature dealing with the question whether Article 51 limits the customary right of self-defense.

³ Moore, *supra* note 1, at 57.

⁴ *Id.* at 58 n.56, 67.

⁵ *See id.* at 58.

⁶ *Id.*

⁷ *Id.* at 58, 60, 64, 89.

mand and control facilities within its territory by the Salvadoran guerrillas, to train Salvadoran guerrillas, to finance their operations in El Salvador and to provide sanctuary for Salvadoran guerrillas in Nicaragua.⁸

At the same time, Moore cites the statements of Nicaraguan defectors or captured Salvadoran rebels or rebel defectors suggesting that the actions of the Salvadoran insurgents are directed from the territory of Nicaragua,⁹ or by the Government of Nicaragua itself.¹⁰ These various activities, he concludes, constitute a continuing armed attack against El Salvador by Nicaragua.

In response to these charges, the following observations can be made. First, it certainly appears that large quantities of arms were shipped from Nicaragua (as well as other points) to the guerrillas in El Salvador from late 1980 to early 1981. After that time, however, the evidence in the public record suggests that while shipments of ammunition and explosives, and perhaps some arms, have continued from Nicaragua to El Salvador, such shipments have been on a relatively low level. This conclusion is supported by the fact that no significant shipments of arms have been captured since that time. Such arms as have been captured have involved very small quantities.¹¹

Second, Moore presents no persuasive evidence that the guerrilla operations in El Salvador have been directed and controlled by the Nicaraguan Government. The existence of "communications, command and control" centers in Nicaragua does not necessarily mean that they have been directed by Nicaraguan officials. The only evidence cited that might support this conclusion either relates to the arms shipments of 1980-1981 (when Nicaraguan officials allegedly controlled the warehouses where the arms were stored),¹² or is based on statements of Nicaraguan defectors or captured Salvadoran guerrillas that are themselves ambiguous.¹³

An important distinction that should be, but is not always, made is that between the military term "command, control and communications" and the legal term "direction and control" (or its equivalent) by a government sufficient to make guerrillas in another country its agents, with the result that the guerrillas' acts may be attributed to the state controlling them. The presence of "communications, command and control" facilities in Nicara-

⁸ *Id.* at 58, 60-64, 89. See *infra* notes 15-16 and accompanying text.

⁹ Moore, *supra* note 1, at 64.

¹⁰ *Id.* (citing statements of Miguel Bolaños Hunter).

¹¹ Moore invites his readers to review reports by the State and Defense Departments, which, he says, "document repeated interception of arms and ammunition shipments." *Id.* at 61. This writer invites the reader to do likewise, with a careful eye to the dates involved and the sources of the information on which specific statements are based. The reader might also consult the detailed critiques that have been published in the *Washington Post*, and elsewhere, following the release of the principal reports. See also *Wash. Post*, July 19, 1984, at A17, col. 1 (early draft of white paper called supplies "sporadic" only); *N.Y. Times*, Sept. 12, 1984, at A9, col. 5; *N.Y. Times*, Apr. 15, 1985, at A9, col. 1. For a general assessment of U.S. evidence regarding the arms flow from Nicaragua to El Salvador, see, e.g., *Wash. Post*, July 8, 1984, at A1, col. 1.

¹² See Moore, *supra* note 1, at 57.

¹³ See, e.g., *id.* at 64 (statement of Alejandro Montenegro).

gua—particularly if they are manned by Salvadoran guerrillas—does not necessarily mean that the Government of Nicaragua exercises "direction and control" over guerrilla activities in El Salvador, which might convert such activities into actions legally imputable to Nicaragua. Permitting such activities to be conducted in its territory may indeed involve the violation of its international legal obligations by Nicaragua, but that does not in itself represent an armed attack on El Salvador by Nicaragua.¹⁴

These distinctions are of critical importance in evaluating the significance of evidence such as the findings in the House intelligence committee's report of May 13, 1983, cited by Moore. In that report, Moore states, the committee found that the Salvadoran insurgents

rely on the sites in Nicaragua for command and control and for logistical support. The intelligence supporting these judgments provided to the committee is convincing. There is further evidence that the Sandinista government of Nicaragua is helping train insurgents and is transferring arms and financial support from and through Nicaragua to the insurgents. They are further providing the insurgents bases of operations in Nicaragua.¹⁵

Aside from the important question of the extent to which this statement was based on information from the period 1980–1981 when Nicaragua was actively involved in the large-scale shipment of arms to El Salvador,¹⁶ this

¹⁴ Allowing such activities appears to violate Article 2(4) of the UN Charter, Article 18 of the OAS Charter and customary international law, without, however, constituting an armed attack such as is required by Article 51 of the UN Charter for the United States lawfully to use force against Nicaragua in exercise of the right of collective self-defense. See *infra* notes 34, 45–46 and accompanying text.

¹⁵ H.R. REP. NO. 122, 98th Cong., 1st Sess. 5 (1983), quoted in Moore, *supra* note 1, at 61.

¹⁶ The excerpt reproduced above, which Moore refers to as "congressional findings [that] appear in a report of the House Permanent Select Committee on Intelligence, dated May 13, 1983," is actually taken from a statement made by the chairman of the committee on March 4, 1982. H.R. REP. NO. 122, *supra* note 15, at 5. What the committee stated in 1983 was the following:

[T]he Committee believes that the intelligence available to it continues to support the following judgments with certainty:

A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadoran insurgents transits Nicaragua with the permission and assistance of the Sandinistas.

The Salvadoran insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.

The Sandinista leadership sanctions and directly facilitates all of the above functions.

Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.

In addition, Nicaragua and Cuba have provided—and appear to continue providing—training to the Salvadoran insurgents.

Id. at 6. The extent to which these judgments were based on intelligence regarding activities as far back as 1980–1981 is not clear.

evidence suggests only that Nicaragua has violated international law, and not that such violations represent an armed attack within the meaning of Article 51 of the UN Charter. Consequently, the appropriate remedies for any such violations of international law by Nicaragua include, *inter alia*, a request for collective action by the Organ of Consultation under Article 6 of the Rio Treaty, a request for action by the Security Council or resort to the International Court of Justice. They do not include the use of force against Nicaragua.

The second proposition on which Moore builds his case is that U.S. support of the contras and other actions involving the use of force against Nicaragua have been in response to requests for aid in collective self-defense. Aside from the question whether other requirements for the lawful exercise of that right have been met, which will be considered below, it can be asked whether and when assistance in exercise of the right of self-defense has been requested by the states that may have been subjected to alleged armed attack by Nicaragua. First, has Costa Rica, Guatemala or Honduras ever stated that it is a victim, in the sense of Article 51, of an armed attack by Nicaragua and requested that the United States assist in providing measures of collective self-defense to meet such an attack? As far as this writer is aware, no such requests have been made.¹⁷ To the extent that Moore's collective self-defense justification rests on alleged armed attacks against these countries, it therefore appears that the requirement of a request for assistance in meeting an armed attack¹⁸ has not been met. Consequently, whatever Nicaraguan actions may

¹⁷ Even the Honduran request for assistance in response to border incursions into Honduras by Nicaraguan forces attacking contra camps, during the week of March 24, 1986, does not appear to have been phrased in terms of an "armed attack" against Honduras. What the Reagan administration labeled a Nicaraguan "invasion" of Honduras appears, in retrospect, to have been a limited attack on the contra camps from which attacks on Nicaragua have been launched, and consequently a proper exercise of the right of self-defense by Nicaragua. The Honduran request for \$20 million in emergency military assistance appears to have been made on the initiative of U.S. officials, while the timing suggests the possibility that the so-called invasion was adroitly used by the administration to influence the vote in the Senate on the President's \$100 million request for aid to the contras. *See, e.g.*, Wash. Post, Mar. 29, 1986, at A17, col. 1 (analysis); L.A. Times, Mar. 29, 1986, at 1, col. 2 (U.S. pressure on Honduras to complain of incursion).

¹⁸ The requirement of a request by the attacked state for assistance in exercise of the right of collective self-defense inheres in the very concept of collective self-defense. Such a request is required under Article 51 of the UN Charter. *See* Ago, *supra* note 2, at 68 (request or consent required). The reporting requirement in Article 51 may be viewed as serving the function of ensuring that such a request has been made.

In the present case, the requirement of a request from the attacked state is expressly mandated by Article 3(2) of the Rio Treaty, which provides:

On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph [i.e., to assist in collective self-defense] and in accordance with the principle of continental solidarity. The Organ of Consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be taken.

have been directed against these countries cannot be used to justify U.S. actions against Nicaragua under the rubric of collective self-defense.

The second question has to do with the precise date on which El Salvador requested U.S. assistance in meeting the alleged armed attack of Nicaragua. Curiously, Moore cites a personal communication to him by President Magaña made in May 1984, in which Magaña confirmed that El Salvador had requested U.S. assistance.¹⁹ In the State Department's statement on withdrawal from the proceedings in the World Court, issued on January 18, 1985, the United States affirmed that in the pleadings relating to El Salvador's request to intervene in the preliminary objections phase of *Nicaragua v. United States*, "El Salvador declared that it was under armed attack by Nicaragua and, in exercise of its inherent right of self-defense, had requested assistance from the United States."²⁰ Surprisingly, the United States referred to the Salvadoran statement, and not to the specific request itself. El Salvador, for its part, stated in the pleadings before the Court the following:

El Salvador considers itself under the pressure of an effective armed attack on the part of Nicaragua and feels threatened in its territorial integrity, in its sovereignty, and in its independence, along with the other Central American countries. . . .

. . . . It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defense. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States

Art. 3(2), Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, TIAS No. 1838, 21 UNTS 77 [hereinafter cited as Rio Treaty].

Article 3(1) of the Rio Treaty establishes that the parties "agree that an armed attack by any State against an American State shall be considered as an attack against all the American States," and, consequently, that each "undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the United Nations Charter." *Id.*, Art. 3(1). Similarly, Article 27 of the OAS Charter provides: "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States." Art. 27, ORGANIZATION OF AMERICAN STATES CHARTER, Apr. 30, 1948, 2 UST 2394, TIAS No. 2361, 179 UNTS 3, as amended by Protocol of Buenos Aires, 21 UST 607, TIAS No. 6847 [hereinafter cited as OAS CHARTER]. However, it is clear that both Article 3(1) of the Rio Treaty and Article 27 of the OAS Charter are subject to the requirement of a request contained in Article 3(2) of the Rio Treaty. The principle in Article 27 of the OAS Charter is subject to the provision, in Article 28, that the measures and procedures established in the Rio Treaty shall apply in the case of an armed attack or other act of aggression. OAS CHARTER, *supra*, arts. 27-28. Consequently, neither Article 3(1) nor Article 27 establishes a basis for the argument that the parties have made a prior and valid request for assistance in exercise of the right of self-defense. Article 3(2) effectively precludes any such possibility.

¹⁹ Moore, *supra* note 1, at 104 n.240.

²⁰ U.S. Dep't of State, U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, reprinted in 24 ILM 246, 248 (1985).

Congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world.²¹

The references to Duarte's *recent* visit to the United States and to his statement to congressmen sound curious, and raise an important, if frequently overlooked, question: On what date did El Salvador request U.S. assistance in exercising the right of self-defense against the alleged armed attack of Nicaragua? It would also be interesting to see a copy and learn the precise wording of the request.

One strong possibility is that El Salvador never made a request for U.S. assistance in meeting the alleged Nicaraguan armed attack before early April 1984, when U.S. officials began to focus on the legal issues because U.S. responsibility for the mining of Nicaraguan ports and harbors had become known, the United States was called upon to defend its actions in the Security Council and Nicaragua brought its claim in the World Court. If this is true, the omission may have been due to the covert nature of U.S. actions against Nicaragua up until that time, and the fact that such operations were under the control of the Central Intelligence Agency, which is not in the habit of providing public legal justifications for its actions. CIA and other U.S. officials may well have overlooked the need for a legal justification and the concomitant need for a Salvadoran request for assistance in meeting a Nicaraguan armed attack in accordance with the requirements of Article 51 of the UN Charter.

The conclusion that emerges from the foregoing considerations is that United States actions against Nicaragua from 1981 to 1984 may not be justified as collective self-defense if El Salvador failed to make a proper request under Article 51 for assistance in meeting an armed attack prior to April 1984. In any event, U.S. assistance to El Salvador could be justified as collective self-defense only after the date on which the Salvadoran request was made. The absence of contemporaneous public references to any such request prior to April 1984 suggests the strong possibility that no such request was made before that time.²²

The third proposition on which Moore's conclusions rest is that U.S. actions taken in purported exercise of the right of collective self-defense have met the other requirements for lawful exercise of that right under Article 51 of the UN Charter. For present purposes, it will be sufficient to address only the requirements of proportionality and notification to the Security Council of measures taken in collective self-defense.

²¹ Declaration of Intervention (Article 63 of the Statute) of the Republic of El Salvador (Nicar. v. U.S.) (submitted to the Court on Aug. 15, 1984), *reprinted in* 24 ILM 38, 38, 41 (1985). On the Salvadoran intervention, see generally Sztucki, *Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadoran Incident,"* 79 AJIL 1005 (1985).

²² Moreover, El Salvador does not appear to have ever reported to the Security Council the details of the measures it has undertaken in exercise of the right of self-defense against the armed attack of Nicaragua, despite the reporting requirement contained in Article 51 of the Charter.

Moore supports his contention that the U.S. actions have been proportional to the threat represented by Nicaragua's alleged armed attack against El Salvador by maintaining that "[t]he U.S. objectives have been to assist in interdicting the attacks through direct assaults on weapons shipment points and through the diversion of Nicaraguan resources to internal concerns. Most importantly, the contra policy seems intended to convince Nicaragua to cease the armed attacks on its neighbors."²³ He observes that "contra attacks in Nicaragua are disrupting shipments and requiring the Sandinistas to turn their attention inward."²⁴

Furthermore, Moore suggests that both the mining of Nicaraguan ports and harbors and attempts to overthrow the Nicaraguan Government would satisfy the proportionality requirement. He states, "[T]he careful use of naval mines in response to an armed attack is not prohibited by general international law and may be a proportional response to assist in interdiction of the attack."²⁵ At the same time, although he maintains that neither the objectives of the contras nor U.S. policy is aimed at overthrowing the Sandinista Government of Nicaragua,²⁶ Moore argues that such an overthrow "would be a lawful defensive objective; that is, it would be both necessary and proportionate to overthrow an attacking government that refused to halt its aggression."²⁷

Comparing U.S. support of the contras and other actions against Nicaragua with the actions of the latter, Moore concludes, "It is difficult to see how the considerably more restrained U.S. response against Nicaragua can be disproportionate to Nicaragua's determined and continuing attacks against four Central American states."²⁸ With respect to the goal of the contras, he states, "The argument that the contras are not engaged in the direct interdiction of weapons is both factually wrong and naive in missing the point that assistance to the contras is a defensive strategy."²⁹ In support of the proposition that the argument is factually wrong, Moore cites one example, in the following terms: "For example, the resupply base at La Concha in Nicaragua seems to have been taken out of action by resistance attacks."³⁰

However, there are two fatal flaws in Moore's argument that the requirement of proportionality in exercise of the right of self-defense has been met. The first is that the military actions of the contras have not in fact been limited to actions bearing a direct and rational relation to the objective of halting shipments of arms, ammunition and other materiel to El Salvador. The second is that the goals of neither the United States nor the contras have been limited to halting Nicaraguan support of the guerrillas in El Salvador.

²³ Moore, *supra* note 1, at 72.

²⁴ *Id.* at 58.

²⁵ *Id.* at 87 n.183.

²⁶ *Id.* at 112-14.

²⁷ *Id.* at 114.

²⁸ *Id.* at 89. Interestingly, Moore cites congressional limitations on U.S. assistance to the contras as evidence of the restrained nature of the U.S. response. *See id.* at 72-73.

²⁹ *Id.* at 114.

³⁰ *Id.* The reason for his careful qualification of even this assertion, by using the word "seems," is not clear.

First, the pattern of contra attacks on civilian targets and the country's civilian infrastructure, the massive destruction of oil storage facilities, the mining of ports and harbors, and, in particular, the actions of insurgents fighting in the south along the Costa Rican border cannot easily be understood as proportionate responses aimed at intercepting the supply of arms to guerrillas in El Salvador.³¹ Moreover, the fact that one or more contra actions may be directly related to the objective of arms interdiction, such as in the single, qualified example that Moore cites, does not mean that the other and more numerous actions of the contras satisfy the requirements of necessity and proportionality.

Second, even if we were to accept the statement of March 2, 1985, quoted by Moore, as reflecting the contras' actual objectives (i.e., by discounting the possibility that they were advised to omit their real, fundamental objective of overthrowing the Sandinista Government), those objectives include goals wholly unrelated to halting the alleged armed attack against El Salvador. They call for, *inter alia*, the immediate dissolution of the National Constituent Assembly and new elections for that body, municipal elections, and a plebiscite on the conduct of new presidential elections, in addition to observance of human rights in accordance with Nicaragua's international legal obligations.³² As Moore himself states, "Even this program of the Nicaraguan resistance is not dedicated to forcefully overthrowing the Government of Nicaragua, but rather to pressuring that Government to guarantee human rights and to hold free elections as pledged to the OAS and the people of Nicaragua."³³ However laudable these objectives may be, they are certainly unrelated to the defense of El Salvador against any Nicaraguan armed attack that might be represented by shipments of arms, ammunition and other supplies. They are also objectives that one state may not lawfully force upon another through the application of military "pressure."³⁴

Recently, President Reagan and other U.S. officials have been quite candid about United States objectives in supporting the contras. In an interview with *Time* magazine, published in its March 31, 1986 issue, President Reagan, when asked about the U.S. goal, replied as follows:

³¹ See generally C. DICKEY, *WITH THE CONTRAS* (1985); *infra* note 44.

³² Moore, *supra* note 1, at 74-75.

³³ *Id.* at 75. Continued references to the Sandinista "pledges" to the OAS, made in a communication of their intentions sent prior to assuming power, seem oddly malapropos in view of the absolutely binding legal obligations Nicaragua has assumed by ratifying the American Convention on Human Rights and other human rights treaties. Perhaps this continued reference can be explained only as an attempt to call attention to the issue of human rights, without at the same time drawing attention to the fact that the American Convention has been sitting in the Senate, gathering dust, since President Carter presented it for Senate approval in 1978.

³⁴ See, e.g., UN CHARTER art. 2, para. 4; OAS CHARTER, *supra* note 18, art. 18. The text of Article 18 is particularly significant:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

The cancer that has to be excised is Nicaragua. We can try and help those people who want freedom to bring it about themselves. We have a right to help the people of Nicaragua who are demanding what we think are any people's rights—the right to determine their own government.³⁵

When asked what the contras could accomplish, President Reagan, in unequivocal terms, affirmed the following:

The Sandinistas have to look at one of two choices: the possibility of a military defeat and being totally overthrown, or a choice of having a political settlement in which, while they would have to give up the monopoly on power they have, at least they could be in a position to run for office if they could get the people's approval.³⁶

These statements followed earlier declarations by the President that the goal of the United States was to remove "the present structure" of the Sandinista Government of Nicaragua. According to one unnamed, high official quoted in the *New York Times*, arms interdiction *never* was the goal of aid to the contras.³⁷ With such statements, as Professor D'Amato has observed, "[T]he entire notion of collective self-defense, of aiding Nicaragua's neighbors against armed aggression by Nicaragua and of supporting the contras in Nicaragua so as to stop Nicaragua from exporting its revolution to other countries has melted away as a legal rationale for U.S. policy."³⁸

With respect to the additional requirement that the Security Council be "immediately" notified of measures taken in individual or collective self-defense, established in Article 51 of the UN Charter, it is clear that the requirement has not been met in the present case. Nonetheless, Moore asserts, "There is no prohibition under the Charter—apart from the general requirement of proportionality—against covert action as part of a defensive response to an armed attack."³⁹ However, it is not easy to see how a covert defensive response could satisfy the explicit reporting requirement contained in Article 51. Even if that requirement might be deemed to be satisfied by informing the Security Council of the overt measures of self-defense being taken, and the general nature and scale of the covert measures being taken at the same time—a dubious and highly problematical proposition—the United States has made no such notification with respect to its covert and other actions against Nicaragua. The reporting requirement in Article 51 has the purpose of placing the Security Council in a position to discharge its "primary responsibility" for maintaining international peace and security. Moore's *implicit* argument is that covert measures of self-defense need not be reported to the Security Council. If accepted, it would write the reporting requirement in Article 51 out of the Charter.

³⁵ TIME, Mar. 31, 1986, at 16.

³⁶ *Id.*

³⁷ N.Y. Times, Mar. 17, 1985, at A1, col. 5.

³⁸ D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 AJIL 657, 658 (1985).

³⁹ Moore, *supra* note 1, at 89.

Differences in Appreciation of the Facts

The fundamental differences between Professor Moore's analysis and conclusions and those set forth in the present article should be clear from the preceding analysis. Among the most important are those which are briefly summarized below.

On the first level, with respect to the facts, Moore believes that the flow of arms, ammunition and other materiel from Nicaragua to El Salvador continues at a relatively high, if diminished, level. To this observer, the evidence in the public record suggests, at most, a continuing flow of ammunition, supplies and some arms at a very low level. As Professor Franck has observed in a different context, "It is not really credible that a 4-year-long effort at large-scale training, supply and direction of Salvadoran insurgents by Nicaragua and Cuba would have remained entirely invisible except to highly classified sensors."⁴⁰ The difference in appreciation of the facts regarding shipments of arms and materiel is, in any event, merely one of degree. Moore himself admits that the "reduction in arms shipments [after 1981] seems to be the kernel of truth" in the testimony of David MacMichael, a former CIA official, in the merits phase of the proceedings before the International Court of Justice.⁴¹

Second, Moore appears to argue that the Salvadoran guerrillas are under the direction and control of the Nicaraguan Government,⁴² a proposition he does not push and for which, in this writer's view, there exists very little factual support. Particularly after 1981, there appears to be scant evidence that the Salvadoran guerrillas, who are divided into a number of factions, are or have been acting as agents of the Government of Nicaragua.⁴³ This is an important point, for measures of self-defense can be justified only in terms of the circumstances existing at the time they are taken, i.e., as a specific response to an ongoing armed attack.

A third important difference in appreciation of the facts can be found in Moore's assertions that the military actions of the contras are aimed at the interdiction of supplies from Nicaragua to guerrillas in El Salvador. As noted above, the current analysis rejects this assertion as unsupported by the evidence and contradicted by a number of facts in the public record.⁴⁴

⁴⁰ Franck, *Icy Day at the ICJ*, 79 AJIL 379, 379 (1985).

⁴¹ Moore, *supra* note 1, at 58 n.56.

⁴² See *supra* notes 8-9, 12-13 and accompanying text.

⁴³ See, e.g., Leiken, *The Salvadoran Left*, in *CENTRAL AMERICA: ANATOMY OF CONFLICT* 11 (1984); E. BALOYRA, *EL SALVADOR IN TRANSITION* 116-19, 160-66 (1982).

⁴⁴ The House Permanent Select Committee on Intelligence, in its 1983 report, concluded as follows:

The activities and purposes of the anti-Sandinista insurgents ultimately shape the program. Their openly acknowledged goal of overthrowing the Sandinistas, the size of their forces and efforts to increase such forces, and finally their activities now and while they were on the Nicaraguan-Honduras border, point not to arms interdiction, but to military confrontation. As the numbers and equipment of the anti-Sandinista insurgents have increased, the violence of their attacks on targets unrelated to arms interdiction has grown, as has the intensity of the confrontation with Sandinista troops.

A final and related difference with respect to the facts relates to the objectives of the United States and of the contras in applying military pressure against Nicaragua. Moore believes they are limited to the halting of shipments of arms and other supplies to El Salvador. The present analysis concludes that statements by President Reagan and others, including contra leaders, do not support Moore's view, and that the pattern of U.S. and contra military and paramilitary activities against Nicaragua shows that they are inconsistent with this limited objective.

Differences in Legal Interpretation

On the second level, of legal argument, of what is actually required and permitted by international law, there are several differences between Professor Moore's interpretation and the present analysis. These have far-reaching implications.

First, Moore believes that the shipment of arms constitutes an armed attack within the meaning of Article 51 of the UN Charter, even in the absence of direction and control of the insurgents in the target state by the state shipping or allowing such arms to be shipped.⁴⁵ While recognizing that such shipments represent significant violations of important norms of international law, the present author concludes that they do not constitute an armed attack giving rise to the right to use force in individual or collective self-defense. This, it is suggested, is the law, which, moreover, is supported by strong policy considerations. The latter include the fact that acceptance of the proposition that arms shipments constitute an armed attack would greatly expand the number and type of situations in which force might lawfully be used, while eliminating the "bright line" established by the armed attack requirement in Article 51.

This "bright line" allows participant states in a highly decentralized international legal system, characterized by the existence and exercise of "horizontal" authority, to identify illegal uses of force readily and to react accordingly. The rule suggested by Moore would allow states to use force in a broad range of situations in which the facts are not transparent or susceptible to ready clarification by disinterested parties, and are therefore subject to unilateral interpretation by the very state that is employing force.

There are certainly a number of ways to interdict arms, but developing a sizable military force and deploying it in Nicaragua is one which strains credibility as an operation only to interdict arms.

Finally, and most importantly, the program has not interdicted arms. . . . [T]he only real results have been a challenge to the regime and heightened tensions with Nicaragua.

H.R. REP. NO. 122, *supra* note 15, at 11. See generally C. DICKEY, *supra* note 31.

⁴⁵ This assertion is contrary to existing law. See, e.g., I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 278-79, 372-73 (1963). While Moore also suggests such direction and control exists, there appears to be little, if any, reliable evidence in the public record to support this view. See Moore, *supra* note 1, at 86-87. Consequently, the position he advances is either based on factual predicates rejected above, or amounts to the argument set forth in the text.

These circumstances would inevitably invite abuse, result in a relaxation of legal restraints on war and lead to increasing levels of interstate conflict involving the use of force across international frontiers.

The second major legal difference with Moore relates to the requirement of proportionality, which is an inherent limitation on the lawful exercise of the right of self-defense. The essence of Moore's argument on this point is that all measures aimed at pressuring a state to cease an armed attack are to be treated as proportional so long as that attack continues. Thus, one may even seek to overthrow the government of the attacking state, or to force it to change its internal political organization, so long as an "attack" represented by low-level shipments of arms continues. Such a view represents a sharp deviation from present international law,⁴⁶ and, if admitted, would invite the unrestricted use of force on a grand scale whenever the right of self-defense might be invoked—on the basis of a unilateral characterization of the facts not subject to prompt or easy verification by other states.

Particularly significant are the implications of accepting both of Professor Moore's legal arguments. In conjunction, they would in practice allow a state to use force in response to a real *or alleged* armed attack represented by low-level shipments of arms, while all but eliminating the traditional requirement of proportionality in all measures taken in exercise of the right of self-defense. Such a twin relaxation of legal restraints would almost inevitably result in increasing levels of violence between nations. That is not what the framers had in mind when they drafted Article 2(4) and Article 51 of the United Nations Charter.

Fortunately, the differences between Professor Moore's assertions and the factual and legal analysis set forth above will very probably be resolved by the International Court of Justice in its forthcoming judgment on the merits in *Nicaragua v. United States*. The Court's decision should provide an authoritative statement of the law regulating the use of force, including the requirements that must be met for the lawful exercise of the right of self-defense. The judgment on the merits will be one of the most important decisions handed down by the World Court in its 65-year history, and not merely because of the parties in the case. Most important, the judgment will clarify an area of law that is critical not only for international lawyers, but also for the survival of nations—and individuals—in a nuclear world in which the use of force has become intolerably dangerous.

II. LEGAL ARGUMENTS FOR DEFYING THE JUDGMENT ON THE MERITS

In his article, Professor Moore also advances two *legal* arguments that could be used by the Reagan administration in an attempt to justify defying an adverse judgment on the merits by the International Court of Justice.

⁴⁶ See, e.g., Malanczuk, *Countermeasures and Self-Defense as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 705, 768–69 (1983); I. BROWNLEE, *supra* note 45, at 261–64, 372–73, 433–36.

First, he argues that, "[u]nder the recognized principle in international law of *excès de pouvoir*, decisions of an international tribunal that exceed its jurisdiction are void."⁴⁷ Moreover, he asserts, "The right to ignore rulings manifestly made in excess of a tribunal's jurisdiction is an independent right of sovereign states. . . ."⁴⁸ The implication seems clear that the United States may therefore ignore the judgment on the merits if the Court's exercise of jurisdiction falls within the doctrine of *excès de pouvoir*.

This line of argument is seriously flawed, for two reasons. The first difficulty is that even the doctrine of *excès de pouvoir* requires that the irregularity must be manifest. Moore interprets this doctrine so broadly as to conclude that the Court's rejection of El Salvador's request to intervene amounted to "an abuse of power depriving the Court of jurisdiction."⁴⁹ Neither its decision with respect to Salvadoran intervention nor its Judgment on Jurisdiction and Admissibility of November 26, 1984, however, appears to involve a *manifest* irregularity. With respect to the main decision, the condition is hardly met in view of the detailed reasoning of the Court and the fact that 11 of its members voted in favor of even the most disputed holding.⁵⁰

More fundamentally, the argument of *excès de pouvoir* ignores the fact that Article 94(1) of the United Nations Charter overrides any principle that might be found in customary international law. Curiously, Moore appears to have overlooked Article 94(1), which provides: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."⁵¹ Moreover, the Court is no ordinary arbitral tribunal, but rather "the principal judicial organ of the United Nations,"⁵² whose decisions are final and binding on any member that is a party to the case in question.⁵³ Thus, the possibility of referring a difference over a decision to the Court for third-party adjudication regarding the applicability of the doctrine of *excès de pouvoir*, which exists in the case of an ordinary arbitral award, does not exist in the case of *Nicaragua v. United States*.

The second argument advanced by Moore that might be used to justify noncompliance with the Court's judgment on the merits is based on the beginning of Article 51 of the UN Charter, which states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs. . . ." From this language, he deduces that "nothing in the Statute of the Court, as well as in the rest of the Charter, can lawfully serve as the basis for impairing the inherent right of collective defense against an ongoing armed attack, and the Court cannot lawfully

⁴⁷ Moore, *supra* note 1, at 96-99.

⁴⁸ *Id.* at 97.

⁴⁹ *Id.* at 95. See *supra* note 21 and accompanying text.

⁵⁰ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392, 442 (Judgment of Nov. 26).

⁵¹ Professor Reisman has made the same argument based on the doctrine of *excès de pouvoir*. Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AJIL 128 (1986). Reisman also seems to have overlooked Article 94(1) of the UN Charter.

⁵² UN CHARTER art. 92.

⁵³ See Statute of the International Court of Justice, Art. 60; UN CHARTER art. 94, para. 1.

issue an order impairing this right."⁵⁴ This argument fails to make the critical distinction between impairing a right, on the one hand, and determining its reach and whether or not action allegedly taken in its exercise is in fact lawful, on the other.⁵⁵ An interpretation failing to make that distinction is unfounded. The argument not only lacks merit, but also is extremely dangerous. If advanced by the United States as a justification for defying the final judgment on the merits, it would greatly undermine the authority of the Court's decisions by setting a precedent that could be invoked by any violator of international law in the future.

In short, there exists no legal justification for defying a judgment on the merits of the World Court. Such defiance constitutes a clear and unequivocal violation of Article 94(1) of the Charter.

CONCLUSION

The fundamental thrust of Professor Moore's arguments regarding both self-defense and compliance with the decisions of the International Court of Justice is that the corresponding judgments are matters that may be properly decided, unilaterally, by any state. Thus, a state need only assert that it is acting in self-defense, or that, *in its view*, the decisions of the Court exceed its authority, to escape legal responsibility. What is at issue ultimately is the very idea that disputes between nations may—and should—be decided by impartial third-party determination of the relevant facts and law.

Fortunately, in *Nicaragua v. United States*, the differences over the facts and the applicable law will be decided by the Court. Thus, the disagreements between Professor Moore and the present writer over these matters, like those between Nicaragua and the United States, will not go unresolved. That, it seems, is the whole point of international adjudication and of the very existence of the International Court of Justice.

Impartial third-party determination of the relevant facts and applicable law is an element of great importance in any legal process. In the international system, the United States and other nations should seek to strengthen this principle, and those few institutions such as the World Court which, over the last hundred years, the community of nations has established to facilitate the resolution of international disputes by resort to legal principle and reasoned argument, instead of war. Surely neither Professor Moore nor the United States, upon careful reflection, can view it as in the national interest to undercut the principle of international adjudication or the authority of the World Court by defying one of its judgments.

Neither of Professor Moore's two basic arguments, relating to self-defense and *excès de pouvoir*, provides any legal basis for disregarding an adverse

⁵⁴ Moore, *supra* note 1, at 99. See also *id.* at 99–101.

⁵⁵ Article 38(1) of the ICJ Statute clearly confers authority on the Court "to decide in accordance with international law such disputes as are submitted to it." See, e.g., *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3, 21–22 (Judgment of May 24) (merits).

decision by the Court in the present case. Article 94(1) of the Charter is a "treaty obligation at the highest level,"⁵⁶ which the United States has solemnly undertaken to uphold.

There has been much talk of violations by other nations of their treaty and other legal obligations. In the event of an adverse decision by the World Court, the United States will have to consider with care not only the short-term political consequences of noncompliance with its own legal obligations, but also the example it will set for others. International lawyers, statesmen and citizens in every country will carefully note the precedent and example set by the most powerful and influential democracy in the world. In reaching the corresponding decision, if it comes to that, the leaders of the United States would do well to weigh its implications for achieving the goal of an ordered international society in which international law and international adjudication, not force, are ascendant.

⁵⁶ Highet, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AJIL 992, 1003 (1985).

EDITORIAL COMMENT

MR. SOFAER'S WAR POWERS "PARTNERSHIP"

State Department Legal Adviser Abraham D. Sofaer explained to a House Foreign Affairs subcommittee on April 29, 1986 that, properly interpreted, the 60-day time limit of the War Powers Resolution¹ is essentially meaningless.

"In recent weeks," Mr. Sofaer testified, "the question has been raised publicly as to the President's right to take military action without the express approval of Congress."² He assured the subcommittee that President Reagan's air strike against Libya fell within the Chief Executive's independent authority under the Constitution. He added that, in any event, "the President is not simply acting alone, under his inherent constitutional authority."³ Why? Because Congress has effectively approved such operations through the enactment of various pieces of legislation, and because the provision of the resolution that precludes the Executive from inferring authority from other legislation⁴ is unconstitutional.⁵ Mr. Sofaer proceeded to suggest that, if the 60-day time period of the resolution expired,⁶ the President could nonetheless continue to infer such authority from appropriations measures and other legislation.⁷

¹ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§1541-1548 (1982)) [hereinafter referred to as resolution].

² Written statement of Legal Adviser Abraham D. Sofaer, in *Contemporary Practice of the United States*, *infra* at p. 636, 642.

³ See Sofaer testimony at p. 642 *infra*.

⁴ Section 8(a)(1) of the resolution provides:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred . . . from any provision of law . . . , including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

⁵ See Sofaer testimony at p. 638 *infra*.

⁶ Section 5(b) of the resolution requires that the President terminate a use of the armed forces in hostilities within 60 days (or 90 days in the event of "unavoidable military necessity") after their introduction into hostilities has been reported to Congress under section 4(a)(1).

⁷ Mr. BERMAN. So then you believe that in fact the executive branch can infer from appropriations measures, other legislation, etc., . . . enacted subsequently to the War Powers Act, that the introduction of hostile activity [*sic*] or whatever reference you want to make to it, is all right notwithstanding the sixty-day limitation in the War Powers Act?

Mr. SOFAER. Yes. And Mr. Congressman, let me just say philosophically why I feel that way. Because I think it's preferable, from the viewpoint of a lawyer advising his client, to look to more limited claims, claims based on a partnership between the President and Congress, rather than to more extravagant, broader claims, claims based on unilateral authority. . . .

Professor Archibald Cox, testifying 2 days later, said he was "aghast" at Mr. Sofaer's theory of implied statutory authority. Understandably so. If Mr. Sofaer is correct—if it is permissible for the President to infer congressional approval to introduce the armed forces into hostilities from general legislation authorizing or appropriating funds for the military—then what little coercion there is to the War Powers Resolution dissolves. For in Mr. Sofaer's view, Congress in 1973 wrote empty words: whatever the constitutional validity of the 60-day time limit, that requirement will never actually apply because Congress apparently will be deemed to have enacted the authorization contemplated by the resolution.⁸

A novel theory,⁹ to be sure, and one that succeeds only insofar as it distorts and ignores.

In the name of narrow interpretation, it ignores the most fundamental canons of statutory construction—those that require that every word be given effect, that presume Congress not to have enacted a nullity, that prefer an interpretation that saves to one that destroys.

In the name of respect for congressional will, Mr. Sofaer's theory ignores the intent of Congress. The theory apparently proceeds on the assumption that a disclaimer of authority cannot simply be stated once, but must be reiterated in every single piece of legislation from which authority might conceivably be inferred. Yet Congress, in enacting legislation, is deemed to be on notice as to what laws already exist; its intent is considered to embrace all acts *in pari materia*. Section 8(a) is in effect a statement by Congress that it wants the War Powers Resolution to be seen as related to every piece of authorizing and appropriating legislation, at least to the extent that that legislation might be read as approving the introduction of the armed forces into hostilities. Section 8(a) of the resolution was intended, the Senate Foreign Relations Committee explained, "to counteract the opinion in the *Orlando v. Laird* decision of the Second Circuit Court holding that passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war."¹⁰

In the name of "partnership," Mr. Sofaer thus ignores the authority of Congress to define its own intent. Section 8(a) of the resolution is, again, a statement by Congress as to how certain statutes should be read. That provision is in effect an instruction to the Executive and the courts. It tells those branches not to apply their usual presumption—the presumption that Congress desires the statute that is last in time to control. Congress has effectively

I'm naturally drawn, in advising my client, to evidence that Congress will approve of what he's going to do. . . .

This exchange is taken from a verbatim transcription of a C-Span broadcast.

⁸ Section 5(b)(1) provides that the President is not required to withdraw the armed forces if Congress "has declared war or has enacted a specific authorization for such use of United States Armed Forces."

⁹ This apparently is the first time that the constitutional validity of §8(a)(1) of the resolution has been challenged by the executive branch.

¹⁰ S. REP. NO. 220, 93d Cong., 1st Sess. 20 (1973) (War Powers).

said that, here, it wishes the *first* in time to control—unless it specifically signals a contrary intent. There is no reason why the last in time must control if Congress indicates otherwise, nor is there any reason why Congress must leave its intent to be guessed at by the Executive or the courts. Indeed, Congress has used this very method before to preclude those branches from guessing wrong.¹¹

Given Mr. Sofaer's theory of implied statutory approval, the war powers partnership between Congress and the Executive, as contemplated by the Legal Adviser, is analogous to a tap-dancing duo of a chipmunk and an elephant. To the elephant, it would be a smashing success.

MICHAEL J. GLENNON

¹¹ See, e.g., §15 of the Act of Aug. 1, 1956, as amended, Pub. L. No. 84-885, 70 Stat. 890 (codified at 22 U.S.C. §2680(a)(1)(b)) (prohibiting appropriations not authorized by law to be made to the Department of State and precluding nonspecific supersession of that prohibition).

NOTES AND COMMENTS

THE SEVENTH EMERGENCY SPECIAL SESSION OF THE UN GENERAL ASSEMBLY: AN EXERCISE IN PROCEDURAL ABUSE

On July 22, 1980, the UN General Assembly met for its seventh emergency special session, with "the Question of Palestine" as the substantive item on its agenda. As of the time of writing—some 5½ years later—that session has still not been formally concluded, the General Assembly having decided on five successive occasions between July 29, 1980 and September 24, 1982 "to adjourn the seventh emergency special session temporarily and to authorize the President of the latest regular session of the General Assembly to resume its meetings upon request from Member States."¹

The formal basis for holding emergency special sessions of the General Assembly is to be found in Resolution 377A (V), adopted by the General Assembly on November 3, 1950 (commonly known as the "Uniting for Peace" Resolution), and the Rules of Procedure of the General Assembly, as amended in the annex to that resolution.² The key provision of Resolution 377A (V) is set forth in its operative paragraph 1, under which:

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.³

¹ GA Res. ES-7/2, para. 14 (July 29, 1980); ES-7/4, para. 17 (Apr. 28, 1982); ES-7/5, para. 10 (June 26, 1982); ES-7/6, para. 12 (Aug. 19, 1982); ES-7/9, para. 10 (Sept. 24, 1982).

² The UN Charter itself makes no mention of *emergency* special sessions. Under Article 20 of the Charter, "[t]he General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations." The dominant view regards emergency special sessions as a streamlined version of special sessions in general, designed to meet the emergency situations they are intended to address. *See, e.g.,* D. BOWETT, UNITED NATIONS FORCES 297-98 (1964).

³ On the entry into force, in September 1965, of the Charter amendments adopted by the General Assembly on Dec. 17, 1963 (Res. 1991 (XVIII)), which, *inter alia*, enlarged the Security Council from 11 to 15 members and correspondingly increased from 7 to 9 the number of votes required to adopt a decision by the Council, the General Assembly passed Resolution 2046 (XX) of Dec. 8, 1965. That resolution amended Rule 8(b) of the Assembly's Rules of Procedure, which now reads as follows:

It is not the intention here to discuss the constitutionality or otherwise of the "Uniting for Peace" Resolution. Over the years, that initially controversial issue—which was also extensively debated in international law literature of the fifties⁴—has largely become moot, in particular since the handing down on July 20, 1962 of the International Court of Justice's Advisory Opinion on *Certain Expenses of the United Nations*⁵ and its subsequent acceptance by the General Assembly on December 19, 1962.⁶ Even the Soviet Union—which had been the main objector to the legality of the "Uniting for Peace" Resolution at the time of its adoption—eventually resorted to the procedure provided for under that resolution: on June 13, 1967, then Foreign Minister Andrei Gromyko called "for the immediate convening of an emergency special session of the United Nations General Assembly"⁷ to discuss the situation in the Middle East in the wake of the Six-Day War.

As can be seen from operative paragraph 1 of Resolution 377A (V), to convene an emergency special session, either by a decision of the Security Council or at the request of the majority of the UN membership, the following elements are required:

- (1) existence of a situation "where there appears to be a threat to the peace, breach of the peace, or act of aggression";
- (2) failure by the Security Council, because of lack of unanimity of its permanent members, to exercise its primary responsibility for the maintenance of international peace and security; and
- (3) lack of a regular General Assembly session "at the time" of the failure of the Security Council to deal with the situation referred to in (1) above.

Emergency special sessions pursuant to General Assembly resolution 377A (V) shall be convened within twenty-four hours of the receipt by the Secretary-General of a request for such a session from the Security Council, on the vote of any nine members thereof, or of a request from the majority of the Members of the United Nations . . . or of the concurrence of a majority of Members. . . .

Of the nine emergency special sessions held to date, all but three have been convened by decisions of the Security Council, the exceptions being: (1) the fifth emergency special session on the Middle East (1967); (2) the seventh emergency special session on Palestine (1980); and (3) the eighth emergency special session on Namibia (1981).

⁴ Of the voluminous literature on this topic, see H. Kelsen, *RECENT TRENDS IN THE LAW OF THE UNITED NATIONS* 962-83 (1951); Andrassy, *Uniting for Peace*, 50 AJIL 563 (1956); Vallat, *The Competence of the United Nations General Assembly*, 97 RECUEIL DES COURS 203, 264-67 (1959 II); L. GOODRICH & A. SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 427-33 (1955); D. BOWETT, *supra* note 2, at 290-98.

⁵ 1962 ICJ REP. 151, 162-63 (Advisory Opinion of July 20).

⁶ GA Res. 1854A (XVIII) (Dec. 19, 1962).

⁷ UN Doc. A/6717 (1967). Mr. Gromyko made no explicit reference to Rules 8(b) and 9(b) of the Rules of Procedure of the General Assembly, which had been adopted in the annex to the "Uniting for Peace" Resolution. However, the Permanent Representative of the United States, Ambassador Goldberg, stated in his letter to the Secretary-General, dated June 15, 1967, that "the 'Uniting for Peace' resolution and Rules 8(b) and 9(b) of the General Assembly's rules of procedure constitute the only sources of authority and the basis for the holding of an emergency special session." UN Doc. A/6718-S/7987 (1967).

With regard to the first element, paragraph 1 of Resolution 377A (V) is clearly modeled on Article 39 of the UN Charter, under which the Security Council determines the existence of a situation of this kind. Resolution 377A (V) speaks of a case in which "there appears" to be such a situation. Since in the early years of the United Nations it was generally accepted that only the Security Council could make the determination referred to in Article 39,⁸ Resolution 377A (V) was worded in such a way as to avoid the appearance that the General Assembly was attempting to encroach on the Security Council's authority. The intention of the resolution, however, is clear: it refers to a situation of such gravity that a determination by the Security Council under Article 39 of the Charter would have been warranted, had the Council not been prevented from making one by the exercise of the veto by one (or more) of its permanent members.

The second requirement for activating the emergency special session procedure is a "lack of unanimity of the permanent members" of the Security Council, that is, a failure of the Council to act because of the exercise of the veto by one or more of its permanent members. It is thus evident that the failure of the Council to adopt a decision on a matter coming within the purview of Resolution 377A (V) for any reason other than the exercise of a veto by a permanent member cannot trigger the emergency special session procedure. Consequently, if a draft resolution before the Security Council failed to be adopted because it did not receive the requisite number of votes, the emergency special session procedure should not come into play.⁹

The third element for convening an emergency special session, namely the time factor, requires that the General Assembly "not [be] in session at the time." This condition is eminently reasonable in light of the basic purpose of emergency special sessions. As was rightly stated by the President of the first emergency special session, the overlapping of an emergency special session with a regular session of the General Assembly

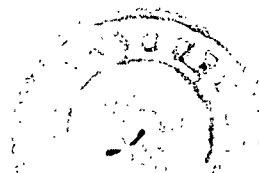
would be contrary to the provisions for the convening of emergency special sessions, which are held solely because the General Assembly is not in regular session. Those who drew up the provisions for emergency meetings certainly did not intend that such meetings should be held when the General Assembly was in regular session and hence fully capable of dealing with the items before it.¹⁰

⁸ In later years, the General Assembly has made findings to this effect which, admittedly, are not binding on the Security Council. Cf. L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 295 (3d rev. ed. 1969).

⁹ This was essentially the argument put forward—unsuccessfully—by the representative of Poland in 1960 in an attempt to prevent the Security Council from adopting Resolution 157 (1960), which called for the convening of the fourth emergency special session on the Congo. 15 UN SCOR (906th mtg.), para. 188, UN Doc. S/PV.906 (1960).

Similarly, in objecting to the convening of the fifth emergency special session in June 1967, the United States representative, Ambassador Goldberg, pointed out that there had been no lack of unanimity of the permanent members, since "five . . . resolutions were adopted unanimously. A sixth draft resolution failed of adoption because it did not receive sufficient votes. Several other draft resolutions are pending before the Council. . . ." UN Doc. A/6718-S/7987 (1967).

¹⁰ 11 UN GAOR (572d plen. mtg.), para. 28, UN Doc. A/PV.572 (1956).



This conclusion was also relied upon—and cited with approval—in the legal opinion of the UN Secretariat dated August 25, 1967, which stated:

[T]here would seem to be considerable merit in the argument advanced by the President of the first emergency special session . . . that holding simultaneous sessions would be contrary to the basic purpose of emergency special sessions, as a device for speedily convening the Assembly when it is not already in session.¹¹

In 1971 the Security Council seems to have endorsed the approach reflected in the statement of the President of the first emergency special session and in the legal opinion of the UN Secretariat. Having encountered two Soviet vetoes on the Bangladesh issue in the course of its 1606th and 1607th meetings, held on December 4 and 5, 1971, respectively, the Council at its 1608th meeting on December 6, in its Resolution 303 (1971), decided to refer that issue to the 26th regular session of the General Assembly, "as provided for in General Assembly resolution 377A (V) of 3 November 1950." Quite properly, then, the Security Council did not call for an emergency special session that would have been held simultaneously with the regular session of the General Assembly; instead, it referred the issue to the regular session itself.

At the same time, the words "if not in session at the time" are not free from ambiguity. In the purely formal sense, these words can be construed to apply merely to the periods between the formal closing of one regular session of the General Assembly and the formal opening of the following regular session. On the basis of this interpretation, no emergency special session could be convened during the periods of adjournment of the regular sessions of the General Assembly (which on occasion lasted from December until the day before the formal opening of the next regular session the following year).¹²

¹¹ 1967 UN JURIDICAL Y.B. 321, 324, para. 18. Neither the legal opinion nor the President of the first emergency special session referred to the question of holding two emergency special sessions simultaneously; this occurred in 1956 when the second emergency special session (Hungary) was held between Nov. 4 and 10, and the first emergency special session (Suez) was held between Nov. 1 and 10, with Mr. Ortega (Chile) as President of both sessions.

The same logic that militates against the holding of an emergency special session simultaneously with a regular session also seems *prima facie* to justify that no two emergency special sessions (or, for that matter, a special session and an emergency special session) be held simultaneously.

However, it must be borne in mind that in practical terms it may be easier to convene a separate emergency special session than to have an additional item inscribed on the agenda of a special (or emergency special) session already convened. Under Rule 19 of the Rules of Procedure of the General Assembly, the inscription of additional items on the agenda of special and emergency special sessions requires a two-thirds majority of members present and voting, with the added and logical proviso that only matters dealt with in the "Uniting for Peace" Resolution can be inscribed on the agenda of an emergency special session. By contrast, the convening of a separate emergency special session requires only the votes of nine members of the Security Council or a simple majority of the UN membership and may thus be more speedily or more easily effected than the inscription of an additional item on the agenda of a session already convened.

¹² Thus, e.g., the 5th session of the General Assembly (opened on Sept. 19, 1950) closed on Nov. 5, 1951; the 31st session (opened on Sept. 21, 1976) closed on Sept. 19, 1977. For the

If a more functional interpretation of the words in question were adopted, the General Assembly would be considered as "being in session" only during periods of *active* deliberation (conceivably including also its special sessions), but not during its nonactive periods and recesses, i.e., the periods between the adjournment of sessions and their resumption.

The former interpretation seems to find some support—by analogy—in the legislative history of the now defunct institution of the Interim Committee of the General Assembly. Under operative paragraph 1 of General Assembly Resolution 111 (II) of November 13, 1947, that committee was established "for the period between the closing of the present session and the opening of the next regular session of the General Assembly."¹³ Moreover, in 1951 the Interim Committee did not meet at all because the fifth session of the General Assembly did not adjourn until the day before the sixth session opened.

By contrast, the latter view seems to be supported by paragraph 1 of General Assembly Resolution 295 (IV) of November 25, 1949, which re-established the Interim Committee "to meet when the General Assembly is not *actually* in session."¹⁴ Moreover, during the recesses of the regular sessions and while they are technically still not closed, their immediate resumption may be difficult for individual member states—and even for the majority of the members—to bring about, since the date of resumption is either determined in advance by a decision of the General Assembly adopted at the time of adjournment or left to the discretion of its President.

In any event, the holding of an emergency special session while the General Assembly is actually in regular session would certainly run counter to the very rationale of the institution of emergency special sessions, as well as violate the letter and spirit of the "Uniting for Peace" Resolution, even on the basis of the narrowest possible interpretation.

* * * *

In the light of the foregoing, it is now possible to proceed to a legal evaluation of the manner in which the seventh emergency special session was convened in 1980.

As early as 1978, it was widely rumored at United Nations Headquarters that the Palestine Liberation Organization (PLO) was exerting its influence with the Arab and nonaligned groups to have an emergency special session on Palestine convened as a device to dramatize the PLO's cause. These rumors found confirmation the following year, when the Sixth Conference

closing dates of the General Assembly's regular sessions in the sixties and seventies that extended beyond their initial 13-week period, see Mourgeon, *Les Sessions peu ordinaires de l'Assemblée Générale*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 491, 495-96 (1979).

¹³ Likewise, on Dec. 3, 1948, the General Assembly reestablished the Interim Committee "for the period between the closing of the present session and the opening of the next regular session of the General Assembly." GA Res. 196 (III) (Dec. 3, 1948).

¹⁴ Emphasis added.

of Heads of State and Government of Nonaligned Countries, held in Havana, Cuba between September 3 and 9, 1979, resolved:

to call for the convening of an emergency special session on the basis of resolution 377 (V), in case the Security Council fails to exercise its primary responsibility as a result of lack of unanimity of the permanent members. The Conference authorizes the coordinating bureau sitting in New York, in consultation with the United Nations Special Committee on the Exercise of the Inalienable Rights of the Palestinian People, to call for such an emergency special session at the appropriate time.¹⁵

"The appropriate time" referred to in the resolution was intended to be created by resuming the deliberations on Palestinian rights that had been held on and off in the Security Council since 1976, whenever such deliberations were deemed expedient in the eyes of the PLO and its supporters; they were to be followed on this occasion by a vote on an Arab-sponsored draft resolution deliberately calculated to produce a United States veto.

Accordingly, the Security Council resumed its deliberations on March 31, 1980, at the request of the Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People. Several weeks and seven meetings later, on April 30, a Tunisian draft resolution¹⁶ produced the result anticipated by its sponsors and was vetoed by the United States.¹⁷ Thus, in the view of the sponsors, the proper legal groundwork ("lack of unanimity among the permanent members of the Security Council") had been laid for the convening of their long-planned emergency special session. Yet the situation they had created was very different from the one that normally exists in genuine emergencies, where it is the emergency situation that brings about the deliberations of the Security Council. In the case under discussion, the order was reversed: it was the Council's deliberations that were intended from the outset to produce an alleged emergency to justify the convening of an emergency special session.

Still, once having forced a United States veto in the Security Council, the sponsors of this contrived emergency would have been expected to behave as if they at least believed in its authenticity and to proceed with due and deliberate speed to convoking an emergency special session. For it is patently absurd to assume that a veto of a permanent member could be used to activate the emergency special session procedure, irrespective of the passage of time. If such an absurd result were indeed possible, it would be reminiscent of the man who complained to the police of having been robbed and when asked about the exact time of the commission of the crime, had to admit that he could not remember such trivial details, the robbery having occurred more than 30 years earlier.

In the case under consideration, the sponsors of the seventh emergency special session clearly did not act with the alacrity expected of anyone claiming

¹⁵ Res. 2 of the Conference on the Question of Palestine, *reprinted in* UN Doc. A/34/542, at 172, 175, para. 11 (1979).

¹⁶ UN Doc. S/13911 (1980).

¹⁷ UN Doc. S/PV.2220 (1980).

the existence of an emergency. Instead of immediately requesting the convening of an emergency special session, in accordance with Rules 8(b) and 9(b) of the Rules of Procedure of the General Assembly, they entered into consultations to determine "the appropriate time" for such a session. In making this determination, they were guided by the coordinating bureau of the nonaligned countries. Their choice eventually fell on the week starting on July 21, 1980, that is, almost 3 months after the "lack of unanimity" in the Security Council that had ostensibly prompted the holding of an emergency special session.

Accordingly, on July 1, 1980, the Permanent Representative of Senegal, in his capacity as Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, requested that the Secretary-General convene such a session.¹⁸ However, for fear that an overzealous and unsynchronized response by the majority might force a premature convocation of the General Assembly—prior to the "appropriate time" previously determined by the coordinating bureau of the nonaligned countries—an ingenious and novel device was resorted to: the bulk of the member states concurring in the request were asked to deposit their letters of concurrence with the Cuban Mission to the United Nations (Cuba presided over the group of nonaligned countries in the years 1979–1982). It was understood that the Cuban Mission would deliver them collectively to the UN Secretariat on July 21, 1980, to ensure that the emergency special session would indeed convene on July 22, "the appropriate time" set in advance for this premeditated emergency.¹⁹

In this writer's view, the circumstances surrounding the convening of the emergency special session in question, as described above, amount to a clear violation of the first two elements required for the holding of an emergency special session under the "Uniting for Peace" Resolution. A veto by a permanent member cannot operate indefinitely to justify an emergency special session. An emergency situation requires a prompt and urgent response. Failure to respond in such a manner not only vitiates the effect of the veto in this regard but also is hard to reconcile with the requirement that there appear to be a threat to the peace, breach of the peace or act of aggression.²⁰

¹⁸ See Note by the Secretary-General, UN Doc. A/ES-7/1 (1980).

¹⁹ See the statement of the representative of Israel of July 23, 1980, UN Doc. A/ES-7/PV.3, at 26 (1980); see also his letter to the Secretary-General, July 21, 1980, UN Doc. A/35/344 (1980).

²⁰ This aspect of the emergency special session procedure was also referred to by the representative of Israel in connection with the convening, under Security Council Resolution 500 (1982) of Jan. 28, 1982, of the ninth emergency special session (Golan). The Security Council decided to call that emergency special session following the exercise of the veto by the United States on Jan. 20, 1982 (UN Doc. S/PV.2329, at 52 (1982)), to defeat a Jordanian draft resolution (UN Doc. S/14832/Rev.1 (1982)). At the second meeting of that emergency special session, on Jan. 29, 1982, the representative of Israel, in referring to its *mise-en-scène*, told the General Assembly:

In requesting the Security Council to convene an emergency special session [the sponsors of this phony emergency special session] could have been expected to behave as if they believed that an emergency situation existed. One would have expected them to submit

Thus, the two elements in question seem to be interrelated: prompt action after the exercise of the veto by a permanent member seemingly also serves as an indication that a threat to the peace, etc., does exist, or at least is claimed to exist. Such action would normally be expected within a matter of hours—or, at the most, several days—after the veto was cast in the Security Council.^{20a} It certainly cannot be delayed for a period of 2 months, to be followed by another deliberate delay of 3 weeks—all of which happened in the instant case.²¹

* * * *

their request immediately after the Jordanian draft resolution failed of adoption in the Security Council last week. Instead, it took them a whole week and more for "consultations" on a variety of questions . . . including, among other things, the question as to the exact timing at which their contrived emergency would become so urgent as to require this extraordinary abuse of United Nations procedure.

The magnitude of this alleged emergency can also be readily gauged from the fact that none of the sponsors of this exercise was ready to speak this morning. We also understand that this phoney emergency will be suspended for the duration of the week-end so as not to interfere with the week-end plans of all those involved.

UN Doc. A/ES-9/PV.2, at 22 (1982).

^{20a} However, in a legal memorandum dated July 21, 1980, from the Office of Legal Affairs, addressed to the Secretary-General, it was asserted:

The veto [of Apr. 30, 1980] is a matter of public record and as regards the requirement of a threat to the peace the Secretary-General cannot substitute his judgement for that of the Government requesting an emergency special session.

[I]t is for the General Assembly . . . to decide whether a request for an emergency special session meets the requirements of resolution 377A (V). This has in effect been answered in the present case in the affirmative by the concurrence of a majority of Members in the request for the convening of the seventh emergency special session.

1980 UN JURIDICAL Y.B. 187-88.

²¹ It should be pointed out, though, that there was also a delay of several months with regard to the convening, on Sept. 3, 1981, of the eighth emergency special session on Namibia. The "lack of unanimity of the permanent members" occurred in that instance on Apr. 28, 1981, at the 2275th meeting of the Security Council, when triple vetoes (France, the United Kingdom and the United States) were cast to defeat four draft resolutions then before the Council. The convening of the emergency special session, based on those vetoes, was requested by the Permanent Representative of Zimbabwe, in his capacity as Chairman of the African Group, on Aug. 12, 1981, i.e., over 3 months later. See his letter of that date, addressed to the Secretary-General, reproduced in the annex to UN Doc. A/ES-8/1, ES-8 UN GAOR Annexes at 213-14 (1981).

In an apparent attempt to justify this long delay, the Permanent Representative of Zimbabwe stated in his letter that "[s]ubsequent negotiations have failed to resolve or even to advance towards the resolution of the issues" underlying the Namibian question. *Id.* However, this line of argument sounds rather unconvincing for two reasons: (1) it took the majority of the membership another 3 weeks to concur in the request; and (2) the session was eventually timed to convene less than 2 weeks before the opening, on Sept. 15, 1981, of the 36th regular session of the General Assembly, which could have given the question of Namibia—already on its provisional agenda as item 36—priority treatment under Rule 40 of its Rules of Procedure. Moreover, the question of Namibia (referred to as South West Africa until the mid-sixties) having engaged the United Nations virtually since its establishment, there did not appear in

Even after its irregular convening on July 22, 1980, the seventh emergency special session continued to defy the rules of procedure and propriety. On July 29, it adopted Resolution ES-7/2, in which it decided "to adjourn the seventh emergency special session temporarily and to authorize the President of the latest regular session of the General Assembly to resume its meetings upon request from Member States" (para. 14). The present writer believes that an emergency special session (or a special session, for that matter) cannot be adjourned under the existing Rules of Procedure, temporarily or otherwise; alternatively, it certainly cannot be adjourned beyond the opening date of the next regular session following the emergency special session in question.

The provision for a temporary adjournment of a session of the General Assembly is found in Rule 6 of the Rules of Procedure, which reads as follows: "The General Assembly may decide at any session to adjourn temporarily and resume its meetings at a later date." Rule 6 forms part of a set of rules dealing exclusively with *regular sessions* of the General Assembly. The provisions relating to special (including emergency special) sessions of the General Assembly are contained in Rules 7-10 of the Rules of Procedure. They make no provision comparable to that of Rule 6. The silence of the Rules of Procedure on this matter with regard to special and emergency special sessions certainly cannot be attributed to mere oversight. *Inclusio unius exclusio alterius*. One is thus inevitably led to the conclusion that no "temporary adjournment" of special and emergency special sessions of the General Assembly is envisaged by the Rules of Procedure, as currently phrased.

This conclusion appears to be based on considerations not only of formal interpretation but also of plain logic. Regular sessions of the General Assembly have dealt with scores of agenda items (in recent years, their number has been between 130 and 140). It frequently proves impossible to dispose of the General Assembly's business within the 13-week period between September and December. Thus, "temporary adjournment"—which on occasion has lasted until the day preceding the formal opening of the next regular session—is a reasonable device for the proper conduct of the business of the Assembly's regular sessions. Also, there is an obvious time limit to the "temporary adjournment" of a regular session, namely, the opening of the next regular session.

By contrast, special sessions are convened for the purpose of dealing with a limited number of agenda items. In most instances, special sessions have thus far dealt with only one substantive agenda item each,²² while none of

the summer of 1981 to be any particular circumstances that met the requirements of Resolution 377A (V) and warranted an emergency special session on the subject at that time.

²² There appears to have been one exception to this practice. The fifth special session held between Apr. 21 and June 13, 1967 dealt with the questions of South West Africa, peacekeeping and the postponement of the UN Conference on Outer Space. In addition, new members have been admitted to the United Nations in the course of special sessions (Burma at the 2d special session in 1948, Kuwait at the 4th in 1963, and Zimbabwe at the 11th in 1980), but this can hardly be regarded as a real departure from the usual practice of devoting such sessions to one substantive agenda item only.

the emergency special sessions held to date has ever dealt with more than one substantive agenda item.²³ Thus, there does not appear to be any material justification for the adjournment of special sessions, in addition to the impossibility on the formal level of such adjournment, as pointed out above. This applies in particular to emergency special sessions that were convened in the first place because of the alleged urgency of the matters they were called upon to address.

Moreover, contrary to the situation at regular sessions, if "temporary adjournment" of special and emergency special sessions were possible, there would be no obvious time limit to such adjournment—unless one were prepared to regard the day of opening of the next regular session as the extreme time limit for such adjournment.

This, indeed, was the position adopted by the UN Secretariat in its legal opinion concerning the "temporary adjournment," on July 21, 1967, of the fifth emergency special session, which had opened on June 17 of that year. In paragraph 2 of Resolution 2256 (ES-V) of July 21, 1967, the General Assembly had decided "to adjourn the fifth emergency special session temporarily and to authorize the President of the General Assembly to reconvene the session as and when necessary." In its legal opinion, dated August 25, 1967, the UN Secretariat did not deal with the legality of the very adjournment of an emergency special session, presumably either because it was not requested to do so or because it has not been the practice of the Secretariat to question the legality of the actions of the political organs of the United Nations. However, in the concluding observations of the legal opinion in question, it was pointed out that

it would seem desirable for the current fifth emergency special session to hold a meeting a day or two before the twenty-second regular session convenes on 19 September in order to wind up its proceedings and to transfer the item before it to the regular session. . . . It would even be possible, if no difficulties are anticipated, for the fifth emergency special session to wind up immediately before the twenty-second regular session is called to order, particularly since the presiding officer of the one would be temporary president of the other.²⁴

Accordingly, the fifth emergency special session was formally concluded on September 18, 1967—the day before the opening of the 22d regular session—the General Assembly having decided "to place on the agenda of its twenty-second regular session, as a matter of high priority, the question on the agenda of its fifth emergency special session."²⁵

While, in the author's view, not even the adjournment of the fifth emergency special session could be justified on formal legal grounds, there was still an attempt to give those proceedings a semblance of legality, as is demonstrated by the concluding resolution of that session. By contrast, the course

²³ The procedural possibility of including additional items at an emergency special session does exist under Rule 19 of the Rules of Procedure of the General Assembly, provided that the additional item relates to "the matters dealt with in resolution 377A (V)" and that the inclusion is effected by a two-thirds majority of the members present and voting.

²⁴ 1967 UN JURIDICAL Y.B., *supra* note 11, at 325, para. 20.

²⁵ GA Res. 2257 (ES-V), para. 1 (Sept. 18, 1967).

of action taken in this regard by the seventh emergency special session cannot be justified by reference to any applicable rule of procedure or logic. The wording of the adjournment clause of Resolution ES-7/2 and its reference to "the President of the latest regular session of the General Assembly" reveal that it was conceived from the outset by its sponsors as an open-ended, multi-annual exercise, which prompted the representative of Israel to observe that it should be termed "the seventh *permanent* emergency special session of the General Assembly."²⁶

The nature of the "temporary" adjournment of the session was challenged at the time of its first resumption, on April 20, 1982, by the representatives of Israel and the United States. The representative of Israel stated that "a 'temporary' adjournment must surely be temporary and cannot be construed as extending *ad infinitum* to suit the whims of certain States who ride roughshod over the Charter, the rules of procedure of the General Assembly, elementary propriety and basic logic."²⁷ He also told the General Assembly that while the very convening of the seventh emergency special session, in July 1980, had been "both illegal and preposterous, . . . its resumption now, 21 months after it was suspended 'temporarily', and the current revival of an initially contrived emergency, is . . . a complete abuse of the emergency procedure envisaged by the 'Uniting for Peace' resolution and by the rules of procedure of the General Assembly."²⁸

Likewise, United States Ambassador Kirkpatrick, in her letter to the President of the General Assembly, dated April 19, 1982, stated:

It seems plain that the purpose of this "temporary" adjournment was to allow for a resumption in the same time frame if events warranted. We do not believe that Members contemplated that a session could be maintained in a state of adjournment indefinitely with the possibility of being "resumed" on request. Indeed, two regular sessions, two emergency special sessions and one special session of the General Assembly have been held since that time [i.e., July 1980].²⁹

The reply to Ambassador Kirkpatrick of the then President of the General Assembly (Ismat T. Kittani of Iraq) is revealing in that it fully confirms the view that the open-ended character of the seventh emergency special session and its indefinite duration had been deliberately planned from the outset. After pointing out that it was "an unprecedented situation" for the General Assembly "to reconvene an emergency special session after the passage of a considerable period of time and, indeed, after several sessions of the General Assembly have intervened subsequent to the 'temporary' adjournment of the said emergency special session," he then went on to state:

It is my understanding that the intent of the sponsors of resolution ES-7/2 was precisely to permit such a resumption to take place even though other sessions intervened. The legislative history of the reso-

²⁶ Statement of Aug. 17, 1982, UN Doc. A/ES-7/PV.26, at 28-30 (1982) (emphasis added).

²⁷ Letter to the President of the General Assembly, Apr. 21, 1982, UN Doc. A/ES-7/18 (1982).

²⁸ UN Doc. A/ES-7/PV.12, at 51 (1982).

²⁹ UN Doc. A/ES-7/16 (1982).

lution makes this fact very clear. The original draft which was discussed, according to information provided me, authorized "the President of the General Assembly to resume its meetings upon request from Member States." The Assembly President at the time, Foreign Minister Salim [of Tanzania], inquired about the probable timing of such a resumption in order to clarify his own responsibilities in that regard. When the sponsors indicated that the duration of the suspension could not be predicted and the suspension might well extend beyond his tenure of office, the words "of the latest regular session" were inserted in the draft to clarify that, should other sessions intervene, it would be the President of the most recent session who should preside. Conversely, if there had been no expectation that other sessions might intervene, the resolution would, without doubt, have provided that the original President of the seventh emergency special session should reconvene it.³⁰

The adjournment clauses of the several resolutions adopted by the seventh emergency special session in July 1980 and at the subsequent resumed meetings between April and September 1982 "authorize" the President of the General Assembly to resume the meetings "upon request from Member States." Thus, presumably even two member states may make such a request. Likewise, it is not clear whether—following such a request—the President of the General Assembly, who under the terms of the resolution is "authorized" to resume the session, is obliged to do so or may exercise his own discretion in the matter. While in this writer's opinion the discretionary interpretation of the term "authorizes" seems to be the better one, it is noteworthy that in his reply to Ambassador Kirkpatrick, Mr. Kittani took the view that the President of the General Assembly "is obliged" to reconvene the emergency special session upon the request of member states.³¹

The issue, however, has been a moot one thus far. As has been indicated, Mr. Kittani of Iraq was President of the 36th regular session of the General Assembly, and he resumed the session and presided over the meetings begun on April 20, June 25 and August 16, 1982. The President of the 37th regular session was Imre Hollai of Hungary who resumed the session and presided over the meeting of September 24, 1982. For obvious reasons, neither of them could have reasonably been expected to exercise discretion with regard to a request for the resumption of the seventh emergency special session, even if he adhered to a discretionary interpretation of his authority.

* * * *

It was pointed out in the introductory passage of this paper that the seventh emergency special session, first convened in July 1980 and resumed four times between April and September 1982, has not met since its "temporary adjournment" on September 24, 1982,³² and has not been formally closed.

³⁰ UN Doc. A/ES-7/17 (1982).

³¹ *Id.*

³² GA Res. ES-7/9, *supra* note 1, para. 10.

It could conceivably go on indefinitely, with or without any further resumption of its meetings. It is difficult to think of a more serious abuse of an allegedly emergency procedure.

A few additional observations seem pertinent in connection with the second, third and fourth resumptions of the session, in June, August and September 1982, respectively.

(1) As will be recalled, the agenda item for which the session was convened was "the Question of Palestine." However, the resumption of the session's meetings between June and September 1982 was prompted by the hostilities in Lebanon during those months, as was reflected both in the debates in the General Assembly, which revolved primarily around those hostilities, and in the resolutions adopted by the resumed meetings of the session.³³ It is difficult to see how a debate on Lebanon could legitimately have taken place within the framework of an emergency special session that had on its agenda an item entitled "the Question of Palestine," and how resolutions relating overwhelmingly to the situation in Lebanon could have been adopted in the course of such a session.

(2) While the General Assembly was not actively in regular session during the resumed meetings of April, June and August 1982,³⁴ its 37th regular session was formally opened on September 22, that is, 2 days before the fourth resumption of the session on September 24, 1982. Thus, the resumption of the emergency special session while the General Assembly was actively in regular session was a clear and unambiguous violation of Resolution 377A (V), even if one adheres to the narrowest possible construction of the words "if not in session" contained in that resolution.³⁵

(3) The utter inappropriateness of the resumption on September 24, 1982 of the seventh emergency special session under these circumstances is further heightened by the fact that "the Question of Palestine" was also on the agenda of the 37th regular session (agenda item 31) and could have been given priority treatment by the General Assembly under Rule 40 of the Rules of Procedure,³⁶ if, indeed, it was considered to be a matter of urgency.

With these considerations in mind, it is difficult to escape the question raised by the representative of Israel when he first addressed the seventh emergency special session on July 23, 1980. After pointing out that "the holding of this . . . session is both illegal and preposterous" and that "it makes a complete mockery of the rules of procedure of the General Assem-

³³ See GA Res. ES-7/5, ES-7/6 and ES-7/9, *supra* note 1.

³⁴ The 36th regular session was formally closed on Sept. 20, 1982. Beyond the initial 13-week deliberations (between Sept. 15 and Dec. 18, 1981), it also met between Mar. 16 and 29, 1982, and on Apr. 28, 1982, immediately following the temporary adjournment of the seventh emergency special session.

³⁵ See letter from the representative of Israel to the President of the General Assembly, Sept. 22, 1982, UN Doc. A/ES-7/20 (1982).

³⁶ Under Rule 40, the General Committee of the General Assembly, which, under Rule 38, is composed of the President, the 21 Vice-Presidents and the Chairmen of the 7 main committees of the General Assembly, shall, *inter alia*, recommend "what priority should be accorded to an item the inclusion of which has been recommended [by the General Committee]."

bly," he asked rhetorically: "What then is the validity of this bogus 'emergency special session' and of any resolutions that might emanate from it? The short answer is that this session is illegal. It follows that any resolutions adopted by it will be equally illegal and tainted *ab initio*."³⁷

It appears that the procedural deficiencies in the convocation and subsequent conduct of the seventh emergency special session, as described above, are so grave as to justify the conclusion, in this instance, that "non-compliance with the internal rules of procedure by the majority of the General Assembly . . . amounts to a violation of the Charter . . . [since] the normal internal procedure is seriously subverted."³⁸

The Charter does not provide for a mechanism for its authentic interpretation. Consequently, it was agreed by the San Francisco Conference in 1945 "that each organ will interpret such parts of the Charter as are applicable to its particular functions."³⁹ To this extent, it is certainly true that the General Assembly is "the master of its procedure"—to quote an argument that has come to enjoy considerable popularity among the majority of the membership. This mastery of procedure, however, must be exercised *within* the framework of the existing Rules of Procedure, and not by violating or deliberately disregarding them, as has repeatedly been done in the course of the seventh emergency special session of the General Assembly.

YEHUDA Z. BLUM*

CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed.

TO THE EDITOR IN CHIEF:

In *From Sea to Seabed: The Single Maritime Boundary in the Gulf of Maine Case* (79 AJIL 961, 982 (1985)), L. H. Legault and Blair Hankey expressed the view that the provision in the 1982 Convention on the Law of the Sea

³⁷ UN Doc. A/ES-7/PV.3, at 26 (1980).

³⁸ Conforti, *The Legal Effect of Non-Compliance with Rules of Procedure in the General Assembly and the Security Council*, 63 AJIL 479, 486 (1969).

³⁹ Statement on the Interpretation of the Charter, Final Report of Committee IV/2, Doc. 933, IV/2/42, 13 UNCIO Docs. 709 (1945).

Under Article 96(1) of the Charter, the General Assembly may, of course, request that the International Court of Justice give an advisory opinion on any legal question. However, for obvious reasons, the majority in the General Assembly is usually very reluctant to subject its actions to such legal scrutiny. Moreover, even in those instances in which an advisory opinion has been sought, it cannot be considered as being legally binding *per se*. See 2 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 747 ff. (1965).

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for a minimum outer boundary of the Continental Shelf* of 200 nautical miles from shore (Art. 76(1)) injects an important difference in the regime of the Continental Shelf from that found in earlier customary international law and in the 1958 Convention on the Continental Shelf. Thanks to their use of the adjective "earlier," they were correct in their reference to customary international law. If the International Court of Justice is still regarded as the ultimate arbiter of customary international law, as I assume it is, this, however, is no longer true. In its Judgment in the *Libya/Malta Continental Shelf* case (1985 ICJ Rep. 13, 24 ILM 1189 (1985)), the ICJ held that as a result of the general consensus in the Third United Nations Conference on the Law of the Sea on a 200-nautical mile exclusive economic zone, Continental Shelf jurisdiction now extends at least to that distance as a matter of customary international law, without regard to the geomorphology of the intervening ocean floor.

Moreover, their statement never was true as regards the 1958 Convention on the Continental Shelf. As I pointed out some 15 years ago in *The Outer Limit of the Continental Shelf* (64 AJIL 42 (1970)), it is clear that the two criteria of Continental Shelf jurisdiction under the 1958 Convention are "adjacency" and "exploitability." There are places along the west coast of South America where the continental margin does not extend beyond the territorial sea. For this reason, the Latin American countries, under the leadership of Dr. F. V. García-Amador, were vehement in their position in the first United Nations Conference on the Law of the Sea that, as a matter of justice to countries where this situation prevails, the principle of adjacency must be deemed to confer jurisdiction a reasonable distance beyond the territorial sea, subject only to the requirement of exploitability. This view was not opposed by any of the other participants in the conference and may be regarded as a fair interpretation of the 1958 Convention.

From the entry into force of the 1958 Convention until the Third United Nations Conference on the Law of the Sea, there was never any judicial or conventional determination of what constituted a reasonable minimum outward extent of the Continental Shelf. In the light of the Judgment of the ICJ in the *Libya/Malta Continental Shelf* case, it is fair to conclude, supported by the principle of *jus cogens*, that that determination has now been made and that jurisdiction extends a minimum distance of 200 nautical miles under the 1958 Convention, the same as under Article 76 of the 1982 Convention.

LUKE W. FINLAY

THE FRANCIS DEÁK PRIZE

The Board of Editors announces with pleasure the presentation of the Francis Deák Prize for 1986 to Alberto R. Coll, for his article, *Functionalism and the Balance of Interests in the Law of the Sea: Cuba's Role*, which appeared in the October 1985 issue at page 891. The prize, which honors the memory

* Capitals are used advisedly, for the reason that the term "continental shelf" is used in a strictly legal sense in both the 1982 Convention and the 1958 Convention on the Continental Shelf, deviating to a significant extent from the scientific meaning of the term.

of Francis Deák, is generally awarded on an annual basis to one of the *Journal's* younger authors for a work of particular merit.

The Deák Prize Committee characterized Professor Coll's article as follows:

An innovative analysis of Cuba's policy towards the law of the sea, the article persuasively challenges the popular belief that, as economic and technological interdependence grows, international legal doctrines, principles, and rules will be shaped increasingly by functional concerns and less by considerations of ideology and politics. Along the way, it provides a fascinating glimpse into the inner dynamics of UNCLOS III. Valuably documented, well organized, and eminently readable, the article is in the best tradition of international legal scholarship. . . .

In extending its congratulations to Professor Coll, the Board of Editors also wishes to take this opportunity to thank the Institute for Continuing Education in Law and Librarianship and its President, Mr. Philip F. Cohen, through whose continuing generosity the recipient of the prize is granted an award.

ASIL AWARDS FOR 1986

At its 80th Annual Meeting in Washington, D.C. in April 1986, the American Society of International Law awarded its gold medal to Leo Gross. The medal, which commemorates the work of Manley O. Hudson, is awarded from time to time, without regard to nationality, for preeminent scholarship and achievement in international law and in promoting the establishment and maintenance of international relations on the basis of law and justice.

The Manley O. Hudson Medal Committee commended Professor Gross as "epitomizing" the high standards for the award: "In his teaching, his writings, and his service to the Society and as editor of book reviews in the *American Journal of International Law*, Professor Gross has demonstrated admirably that he merits the recognition of this award."

The Society presented its Certificate of Merit for a "preeminent contribution to creative scholarship" to Thomas M. Franck, editor in chief of the *American Journal of International Law*, for his book, *Nation against Nation—What Happened to the U.N. Dream and What the U.S. Can Do About It*. The Committee on Annual Awards, in its unanimous recommendation, praised *Nation against Nation* in the following words:

This book candidly examines the record of the United Nations at forty, primarily in relation to the geopolitical and related interests of the United States. While not overlooking the U.N.'s great achievements, it is nevertheless perceptively critical of the U.N. on numerous counts, particularly in relation to the U.N.'s approach to individual human rights and to conflict resolution. Similarly, it does not shrink from cogent criticism of United States policy toward the U.N., even while acknowledging the positive contributions the United States has made to the U.N. over the years. . . . Informative and discerning, the book enhances greatly our understanding of the practice and prospects of

international law and organization. Also timely and superbly and provocatively written, it is likely to generate considerable interest among the lay public as well as professionals.

The Committee on Annual Awards also unanimously selected Thomas A. Aleinikoff and David A. Martin's *Immigration: Process and Policy* as winner of the prize for a work that "exhibits high technical craftsmanship and is of high utility to practicing lawyers and scholars." "As a vehicle for teaching immigration law," the committee stated, "this casebook succeeds admirably not only at bringing some common-sense clarity to a welter of technical complexity but also at calling insightful attention to a heretofore much too neglected area of legal study that nevertheless impacts significantly upon people, institutions, and resources in everyday transnational life."

A NOTE TO OUR READERS

The memorial tribute to Judge Philip C. Jessup, previously announced for publication in this issue, will appear instead in the October 1986 issue of the *Journal*.

AGORA

SUPERIOR ORDERS VS. COMMAND RESPONSIBILITY

If we examine the well-known doctrines under the laws of war of "command responsibility" and "superior orders is no defense," we find that their combination leads to an unexpected conceptual paradox. Suppose that *A*, a military commander, issues an order to his subordinate *B* that is clearly illegal under the laws of war. (For example, the order may be to execute prisoners of war, or to kill civilians in the absence of military necessity.) If *B* carries out the order, *B* is criminally liable under the Nuremberg precedents and humanitarian law as the perpetrator of a criminal act. Should *B* attempt to defend his action on the ground that he was following orders, the tribunal will respond that the order was illegal and hence should not have been obeyed. Now suppose, however, that *A* is accused of issuing the order that was in fact obeyed and that in fact resulted in the commission of the war crime by *B*. Under the applicable precedents regarding command responsibility, *A* would be held criminally liable. But herein lies the paradox: *A* can contend that the order was concededly illegal, that it should not have been carried out and that the situation is thus equivalent to there having been no order at all. Indeed, *A* argues, if *B* was denied the defense of superior orders because *A*'s order was illegal, then the responsibility for the criminal act was entirely *B*'s. No additional responsibility should be attributed to *A*.

In brief, the conceptual paradox lies in finding both *A* and *B* responsible for the war crime. If *B* is wholly responsible as the perpetrator of the crime, then how could *A* be held responsible for issuing an order that legally was required to be ignored by *B*? *A*'s contention seems compelling on logical grounds. Yet we know that, under the law, both *A* and *B* will be held responsible. Our task, therefore, is to analyze more closely the related concepts of command responsibility and superior orders to see if it is possible to account for the legal results without doing violence to language or engaging in conceptual confusion.

I. THE SPLIT-RESPONSIBILITY SOLUTION

One possible approach to the paradox would be to take the conventional view of superior orders as a plea of mitigation of punishment. Under this view, *B* has not been held 100 percent liable for the war crime; the fact that he was ordered to commit the crime is allowed in mitigation of his responsibility, though not in exoneration of it. It would then appear to follow logically that the portion of the responsibility for the crime that is not attributed to *B* must be attributed to someone else, namely *A*. Hence, if there is *some* responsibility attributable to *A*, *A* should not be exonerated.

A minor objection to this solution is to argue that, under the applicable precedents, *A* is typically convicted for the entire crime and not just for a

portion of it. To put the matter in crude percentage terms, suppose *A* is assigned 30 percent of the responsibility (for giving the illegal order) and *B* is assigned 70 percent (for committing the war crime). Under the mitigation approach to the doctrine of superior orders, *B* might very well have his punishment reduced by 30 percent—that is, a reduction equal to the percentage of responsibility attributable to *A*. But when *A* is sentenced, *A* will typically be punished for the entire crime, and not just for 30 percent of it, under the doctrine of command responsibility. Thus, *A*'s punishment of 100 percent plus *B*'s of 70 percent adds up to 170 percent, which seems unreasonable.

Unreasonableness, however, is not the same thing as incoherence. On the assumptions given, *A* is 30 percent culpable and thus his punishment beyond 30 percent is not illogical even if it is harsh.

But there is a major objection to the split-responsibility solution. *A*'s orders were either illegal or they were legal. They were not 70 percent illegal. As completely illegal orders, they should not have been obeyed. Indeed, the humanitarian rules of warfare require that they be disobeyed. Nothing in the humanitarian rules suggests that illegal orders should be partially obeyed. Indeed, I submit that this is the reason why the so-called defense of superior orders is not a defense at all; although it may be pleaded in mitigation of punishment, it does not go to the determination of guilt. Hence, we should not confuse its use in mitigation of *punishment* with any notion that it requires the splitting of responsibility. Rather, *B* remains 100 percent responsible for the commission of the war crime (even though his sentence might, in the tribunal's discretion, be reduced in light of his superior's orders). As a result, the paradox remains: why are both *A* and *B* responsible for the crime?

II. THE DUALIST SOLUTION

Another possible approach to solving the paradox would be to refer to two different legal systems that are implicated in the relation between *A* and *B*. Under the international legal system, as we have seen, *A*'s order is illegal. But under the domestic legal system that regulates the military relationship between *A* and *B*, *A*'s order is the legitimate command of a military superior. Therefore, we argue that *B* finds himself in a dilemma resulting from his subjection to the concurrent jurisdiction of two separate legal systems. Under the international system, he must disobey the order because it is illegal; whereas under the domestic military system, he must obey the order because it is legal. When *B* is prosecuted, his plea of superior orders is allowed in mitigation of his punishment because the international legal system recognizes the pressure upon *B* from the domestic legal system. However, the duality of legal systems does not exonerate *A*, because *A* was not caught in a similar dilemma. The orders *A* gave were illegal under the international system, but there was no requirement under the domestic legal system that he give those orders. Hence, *A* is guilty under the doctrine of command responsibility.

This manner of resolving the paradox has superficial appeal. Instead of the first approach, which was to split the responsibility between *A* and *B*,

this second approach bifurcates the legal systems impinging upon *A* and *B*, and seeks resolution of the paradox in the conflicting obligations of concurrent jurisdiction.

As before, there is a minor objection that can be made to this way of resolving the paradox. It consists of pointing out the exception built into many domestic legal systems for the laws regulating military forces. Such laws often provide that superior orders need not be obeyed if they violate the laws of war. Sometimes the provision is couched in terms of a requirement that a soldier must obey the *lawful* orders of his military superiors, and other regulations define military conduct that would be unlawful under the international laws of war. Domestic legal systems that contain provisions along these lines thus recognize the dilemma for *B*. They remove *B* from the impossible position of having to obey the illegal orders of a superior and incur liability for the commission of war crimes. They constitute, in effect, an exception to concurrent jurisdiction; they elevate the international legal system (insofar as it pertains to war crimes) to a position of superiority with respect to the domestic military legal system. Such domestic legal systems, therefore, fail to solve our paradox; they leave us in the same original position of confronting the paradox under the international legal system of the conflict between superior orders and command responsibility.

However, the foregoing objection to the dualist resolution of the paradox suffers from being a contingent, and not a necessary, objection. It depends on the contingent fact that some, but not all, domestic legal systems have provisions in their military law excusing soldiers from complying with orders that violate international law. Therefore, the dualist solution is not defeated as a matter of principle; it merely does not obtain in some domestic legal systems.

Yet there is a deeper, and conclusive, objection to the dualist resolution of the paradox. It utilizes the contingent objection just given, but argues that the notion of concurrent jurisdiction in this case is logically incoherent.

Consider the situation from the standpoint of the international legal system (what, in Kelsen's terminology, might be called the "monist" perspective). Certain acts, constituting grave war crimes, must be prohibited. No legal excuse can be permitted that would allow the wanton murder of prisoners of war or harmless civilians. Thus, the international legal system cannot recognize any concurrent jurisdiction over such matters by domestic legal systems; it cannot countenance a legal privilege under domestic law to commit an act that would violate international humanitarian law. Specifically, it cannot allow *B* to raise the military order of his superior officer as a defense to the international crime. As a matter of logic, there cannot be a prohibitory law under one legal system that recognizes a legal exception under a different legal system; if there were, it would not be a prohibitory law, but rather a law that contains a built-in exception. Since we know that the international humanitarian laws do not contain a built-in exception for a military superior's orders, but rather provide that when they call for the commission of an international crime, such orders are flatly illegal, we must rule out the dualist resolution of the paradox.

This analysis has an important byproduct. It reveals that the plea of superior orders in international law in mitigation of punishment does not and cannot rest on the "legality" of the orders under the domestic legal system. Suppose that *B* is indicted for committing a war crime, and he attempts to defend on the ground that he was ordered to commit it by his military superior. His argument that he found himself in a legal dilemma will not be persuasive. Irrespective of the military law of his own country, he was not in a *legal* dilemma, because under international law the order of his military superior was illegal and hence should not have been obeyed. But he was in fact in a dilemma, and he would be well advised to argue that the dilemma was psychological. Faced with an order to commit a war crime, he reasoned that if he disobeyed it, he might be subjected to disciplinary action by his own military hierarchy. Any such disciplinary action, of course, would be illegal under international law, but it might take place anyway. Hence, *B* can argue that in fact, although not in law, he was coerced and therefore should not be held fully accountable for his actions. I think that this line of reasoning is actually what is implied when it is said that there is no defense of superior orders but that superior orders can be taken in mitigation of punishment. It is up to the defendant to prove the *facts* of coercion *given* his superior's orders; it is not enough simply to recite the orders themselves as a matter of legal justification.

III. RESOLVING THE PARADOX

Logical paradoxes are best resolved not by quarreling with the logic, but rather by accepting the full logical consequences and proceeding to a closer analysis of the premises upon which the argument is based. Accordingly, let us accept for the moment the logical consequence of total exoneration for the issuer of the illegal order. In other words, let us accept *A*'s contention that the illegality of his order both exonerates him and fully implicates *B* who carried out the order. This is a tough-minded consequence of the illegality of the order under international law; it is as if *A*'s order were never given, and *B* simply committed a war crime on his own initiative.

However, we know as a fact that under international humanitarian law, *A* will be held responsible under the doctrine of command responsibility. Therefore, we must conclude that *A*'s guilt cannot consist of having issued the order! The order was itself invalid; hence, *A*'s responsibility cannot be based on the order, but must be based on something else.

If we look at the concept of command responsibility as it has been developed through multilateral conventions and in customary law as recognized by the Nuremberg and Far East tribunals, we find that it contains two necessary elements: (1) that the commander knew or should have known of the commission of the war crime, and (2) that he was capable of inhibiting or preventing it.¹ Under these rules, let us again suppose that *A* issues an

¹ I have couched this second requirement in terms of capability rather than the mere fact of being a commander, for at the Far East tribunals it was established that mere nominal command, when conditions were such that the commander was unable to control or discipline his troops,

order to *B* to commit a war crime. The order itself, as we have seen, is illegal and hence invalid. But it nevertheless has evidentiary value under the first of the two elements of command responsibility: the fact that he gave the order means that *A* knew or should have known of the commission of the war crime.

However, *A*'s order does not prove the second of the two elements of command responsibility—that *A* was capable of preventing or inhibiting the commission of the war crime. Does the fact of the order estop *A* to defend on the ground of incapability? The answer must be negative, because capability is a function of the military command structure and the military context, factors that are not necessarily within *A*'s control. The question, in short, is not whether *A* wanted or did not want *B* to commit the war crime, but whether *A* could have stopped or hindered *B* from doing so. The prosecutor's burden of proof on this latter issue is not discharged by simply introducing *A*'s order into evidence; rather, facts must be adduced about *A*'s actual power to affect *B*'s actions.

The initial paradox is thus resolved. The doctrines of "command responsibility" and "no defense of superior orders" are not incompatible with the results of actual cases, and they are not mutually inconsistent. But the liability of the military commander cannot be predicated upon his illegal order alone, for what this analysis has shown is that the element of capability of controlling subordinates must be proven independently.

ANTHONY D'AMATO

SOME COMMENTS ON PROFESSOR D'AMATO'S "PARADOX"

When I read Professor D'Amato's Comment the first time, my immediate impression was that it had been written with tongue in cheek. When I read it again, I was even more convinced that such was the case! While Professor D'Amato and I rarely agree with respect to applicable rules of the law of war,¹ I have heretofore always found his arguments to have some merit. In this case, I do not.

The two doctrines at issue—the "command responsibility" of the superior under certain circumstances for offenses against the law of war committed by his subordinates, and the denial of the subordinate's right to assert the defense of "superior orders" in a trial for offenses against the law of war allegedly committed pursuant to such orders—had been the subject of con-

was insufficient to sustain the prosecutor's burden. See Parks, *Command Responsibility for War Crimes*, 28 MIL. L. REV. 1, 33 (1973). Despite the conclusions of R. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 141 (1982), General Yamashita's case met both elements of command responsibility with respect to some of the war crimes committed in the Philippines in 1944. See 4 UNITED NATIONS WAR CRIMES COMMISSION, *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 1 (1948) (Trial of General Tomoyuki Yamashita). In one of the Far East cases, Admiral Toyoda was acquitted on the ground that he lacked the capability of control. See Parks, *supra*, at 23.

¹ See, e.g., P. TROBOFF, *LAW AND RESPONSIBILITY IN WARFARE* 176-84 (1975).

siderable controversy even prior to the numerous war crimes trials after World War II.² The frequently criticized *Yamashita Case*³ epitomizes the doctrine of command responsibility. (It should be borne in mind that most of the criticism of that case was not directed against the validity of the rule of command responsibility as such, but against the application of the rule on the facts of that particular case.⁴) The doctrine of command responsibility, in a somewhat restricted form,⁵ was codified in Article 86(2) of the 1977 Protocol I.⁶

The doctrine of superior orders, on the other hand, while the most frequently offered, and uniformly rejected, defense in the post-World War II program of war crimes trials, was not the subject of major jurisprudential controversy during that program, but has since become so. It was specifically denied as a defense by Article 8 of the London Charter, which created the International Military Tribunal;⁷ by the Charter of the International Military Tribunal for the Far East;⁸ by Control Council Law No. 10, issued by the Allied Control Commission for Germany;⁹ and by most national courts.¹⁰ However, a provision codifying this exclusionary rule was rejected by the Diplomatic Conference that drafted the four Geneva Conventions of 1949¹¹ and again by the Diplomatic Conference that drafted the 1977 Protocol I.¹²

² The German Military Code in force during World War I provided that if the execution of an order involved a punishable violation of law, the superior officer issuing such an order was alone responsible. However, that code also provided that the subordinate obeying the illegal order was liable to punishment if it was known to him that the order concerned an act that was a violation of law. *The High Command Case*, 11 TRIAL OF WAR CRIMINALS 462, 509 (1948). This latter provision was applied by the German Supreme Court in Leipzig in 1921 in *The Llandovery Castle Case*. 1 L. FRIEDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY* 868, 881 (1972). (The superior officer had disappeared and was not on trial, but the Court left no doubt that had he been a codefendant, he, too, would have been found guilty and would have been punished more severely than his subordinates.)

³ H. LEVIE, *DOCUMENTS ON PRISONERS OF WAR* 294 and 319 (1979); *In re Yamashita*, 327 U.S. 1 (1946).

⁴ A. REEL, *THE CASE OF GENERAL YAMASHITA* (1949); R. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982). Reel was an assistant defense counsel at Yamashita's trial and his bias is obvious. Although Lael found grounds for criticizing the Military Commission that convicted Yamashita for its application of the doctrine of command responsibility, he is a far more impartial analyst of the trial than Reel. I concur with Professor D'Amato's statement that "General Yamashita's case met both elements of command responsibility with respect to some of the war crimes committed in the Philippines."

⁵ The phrase "should have known" was omitted.

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, *reprinted in* 16 ILM 1391 (1977). The United States has not ratified this Protocol and apparently does not intend to do so.

⁷ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *signed* Aug. 8, 1945, 59 Stat. 1544, 3 Bevans 1238, 82 UNTS 279.

⁸ Jan. 19, 1946, *amended* Apr. 26, 1946, TIAS No. 1589, 4 Bevans 20.

⁹ 1 TRIAL OF WAR CRIMINALS, at xvi (1947).

¹⁰ See LAW REPORTS OF TRIALS OF WAR CRIMINALS, *passim* (1947-49).

¹¹ INTERNATIONAL COMMITTEE OF THE RED CROSS, REMARKS AND PROPOSALS 19, 34, 64, and 85 (1948); 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF 1949, at 114.

¹² 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 307

While the latter conference acted as it did because of fears concerning the impact of such a codified provision on military discipline, or because of a belief that the proposal did not go far enough in outlawing the defense, the fact remains that the proposal was rejected.¹³ With that brief discussion of the law, let us examine the concern that these two rules have occasioned in Professor D'Amato.

At the risk of oversimplification, I understand him to find a problem in the following situation: *A* gives his subordinate, *B*, an illegal order to commit an act that constitutes a war crime; *B* obeys the order and commits the offense; *B* may be found guilty of the commission of the war crime, the defense of superior orders not being available to him. But inasmuch as *B* had the duty to refuse to obey the illegal order, a duty he failed to meet, Professor D'Amato finds it logically difficult to reach the conclusion that *A*, who gave the illegal order, should also be held guilty of an offense for having given that same order. Thus, he says that "if *B* was denied the defense of superior orders because *A*'s order was illegal, then the responsibility for the criminal act was entirely *B*'s. *No additional responsibility should be attributed to A*" (emphasis added). It appears to me that Professor D'Amato has raised a straw man that will be blown down by a very slight puff of wind and that the substitution of other characters in his example will quickly demonstrate the validity of that statement.

A Cosa Nostra "godfather" orders one of his "soldiers" to make a "hit," to murder a member of a rival "family"—apparently not an unusual occurrence. The soldier does so and is caught in the act. Obviously, he may be tried for the murder and the defense of superior orders is not available to him. Rather than accept the inevitable, he violates the code of the Cosa Nostra and talks, disclosing that the murder was ordered by the godfather. The latter is then indicted for murder, conspiracy to murder, etc. It is difficult to conceive that anyone would contend that the godfather could defend on the ground that his order to his soldier to murder the member of the rival family was illegal, that the soldier should not have obeyed it, and that, therefore, when he did so, the godfather could not be found guilty of an offense—yet that is precisely what Professor D'Amato postulates as his problem! The hole in the logic of the sequence stated by Professor D'Amato appears to lie in the inclusion of the statement "No additional responsibility should be attributed to *A*." Why not? If a near-bankrupt businessman hires a "torch" to burn down his plant so that he may collect the insurance, is he not just as guilty of arson as the hired arsonist? Is there any rule of law, municipal or international, that insulates one offender against the law from punishment

(1978); H. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS. SUPPLEMENT 38 (1985).

¹³ It may be assumed that in the next war crimes trial involving the defense of superior orders, a well-informed defense counsel will urge that the actions of the two Diplomatic Conferences indicate that subsequent to the completion of the program of World War II war crimes trials, the international community decided that the denial of the right to defend on the basis of superior orders was inappropriate.

just because the actual bullet was fired, or the match was lit, by another, but at his instigation?

Professor D'Amato states that "the conceptual paradox lies in finding both A and B responsible for the war crime." I find no "conceptual paradox" in reaching such a conclusion, either with respect to common law crimes or with respect to war crimes—which latter are, for the most part, common law crimes committed against enemy military or civilian personnel or against nonmilitary objects. Yielding before that "conceptual paradox" would eliminate the crime of "felony murder"—for, using Professor D'Amato's methodology, inasmuch as the man who pulled the trigger was "100 percent liable" for the commission of the crime, there would be no percentage left to apply to his partner in crime. Why is it "unreasonable" to find two, or even more, persons each "100 percent guilty" of the commission of a single criminal act? ("Mitigating circumstances" may reduce the punishment one of them is to suffer, but this has nothing to do with his guilt.)

Professor D'Amato asserts that "the so-called defense of superior orders is not a defense at all; although it may be pleaded in mitigation of punishment, it does not go to the determination of guilt." This is confusing cause and effect. The "so-called defense of superior orders" is *not* a "so-called defense"; it is a real defense, which, for valid reasons, the international community elected to make unavailable to any person charged with the offense of having committed a war crime. However, because, in certain circumstances, it might indicate a diminished *mens rea*, the rule that denies the substantive defense to the accused has often (but not necessarily) permitted proof of superior orders to mitigate punishment. This practice in no way alters the fact that in the court of a country that permits it to be asserted as a defense, it would go to the determination of guilt and, if established, could be a complete defense.

As I have indicated, I find no need to "resolve the paradox" inasmuch as I do not find a paradox; hence, the "Split-Responsibility Solution" and the "Dualist Solution" are, to me, nothing more than jurisprudential theorizing, theorizing that I find it quite unnecessary to indulge in for the purpose of solving Professor D'Amato's "problem."

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CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

PROTECTION OF HUMAN RIGHTS

(U.S. *Digest*, Ch. 3, §6)

Genocide Convention

On February 10, 1986, the United States Senate by a vote of 83 to 11, with 6 senators absent and not voting, gave its advice and consent to ratification of the Genocide Convention by the United States, subject to two reservations, five understandings and one declaration. The text of the resolution of ratification, including the reservations, understandings and declaration, was identical with that recommended by the Senate Committee on Foreign Relations in its most recent report on the Genocide Convention,¹ issued July 18, 1985, and reads:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948 (Executive O, Eighty-first Congress, first session), Provided that:

I. The Senate's advice and consent is subject to the following reservations:

(1) That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in Article II.

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¹ S. EXEC. REP. NO. 2, 99th Cong., 2d Sess. (1985).

(2) That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques.

(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

(4) That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.

(5) That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.

III. The Senate's advice and consent is subject to the following declaration:

That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.²

When reporting out the Convention in 1985, the Senate Committee on Foreign Relations had explained its provisos, in part, as follows:

A. THE SENATE'S ROLE IN THE TREATY PROCESS

. . . .

2. The Effect of Senate Provisos to Multilateral Treaties

. . . In the case of the Genocide Convention, the Committee recommends the Senate adopt two reservations, five understandings and one declaration. Each type of proviso makes a different statement about the international legal obligation the United States would assume by ratifying the Genocide Convention. . . .

A reservation is usually defined as a unilateral statement made by a contracting party which purports to exclude or modify the terms of a treaty or the legal effect of certain provisions. Ordinarily, it affects only the party entering it. All that is required of the other parties to the treaty is that they acquiesce in it. Their own treaty obligations among themselves remain unaffected.

The procedures followed by other parties to a treaty in giving effect to reservations are also well-established. A state that wishes to enter a reservation must see that it is circulated to all other parties. These states then have a year in which to act. Each has the option of accepting or objecting to the reservation. In the event a party accepts the reservation, either expressly or by allowing a year to pass without objecting, the reservation becomes binding upon the accepting state and the reserving state in all disputes between the two.

² 132 CONG. REC. S1377-78 (daily ed. Feb. 19, 1986). The executive branch subsequently developed proposed implementing legislation to incorporate the prohibitions of the Convention as substantive offenses under title 18 of the United States Code.

A party may reject the reservation instead. When this occurs, the treaty relationship between the two states depends on how the objecting state views the reservation. The objector may declare that it believes the reservation to be inconsistent with the "object and purpose" of the treaty. The objecting state can then declare that it is not bound in a treaty relationship with the reserving state. Alternatively, the objecting state may reject the reservation without opposing the entry into force of the treaty between itself and the reserving state. In this event, those provisions of the treaty affected by the reservation do not apply between the objecting and reserving state.

In addition to two reservations, the Committee also recommends that the Senate include five understandings in the resolution of ratification to the Genocide Convention. An understanding is generally defined as a statement which interprets or clarifies the obligation undertaken by a party to a treaty. The Committee's understandings are based on the negotiating history of the Convention; the Committee believes that a review of this history would yield no contrary interpretation of the obligation in question. These understandings are recommended solely to clarify what the United States' legal obligations are under the Convention.

The practice followed in giving effect to understandings to a multilateral treaty is the same as that for reservations. The state issuing the understanding sees that it is circulated to the other parties. If another party fails to object to it, it is binding in all disputes between the two. If the understanding is rejected, the two parties either do not enter into a treaty relationship or do so absent the provisions to which the understanding applies.

In the unlikely event there is some dispute about a term to which a Senate understanding applies, the Committee wishes to state unequivocally that the Senate understanding is controlling. The extent of the United States' obligation is defined by the Senate understandings. No contrary interpretation, whether the result of a decision of the International Court of Justice or some other tribunal, will supersede or nullify the U.S. understandings.

Moreover, so that there can be no doubt about the controlling effect of the U.S. understandings, the Committee decided to include the following in the text of the resolution of ratification:

The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention.

Accordingly, all parties will be on notice of the United States' position respecting the binding nature of these understandings. Any party which fails to object to them will be estopped from contesting them in any dispute involving the United States.

The Committee has also recommended that the Senate include as a condition of its consent to ratification one declaration. A declaration is generally defined as a formal statement, explanation or clarification made by a party about its opinion or intentions relating to issues raised by the treaty under consideration. Ordinarily, declarations do not touch

upon a party's obligations under a treaty. Nonetheless, declarations of a party may be of assistance in interpreting a particular provision of a treaty. Accordingly, absent specific directions to the contrary, any declaration adopted by the Senate is also to appear in the treaty's instrument of ratification.

The fourth type of proviso upon which the Senate can condition its consent to ratification is an actual amendment to the text. An amendment, of course, changes the legal obligations of all parties to the treaty. Generally speaking, when the Senate requires that an amendment be adopted, the President must gain the assent of all other parties to the amendment before he may ratify the treaty on behalf of the United States.

No amendment to the Genocide Convention has been recommended by the Committee. Ninety-six other states have ratified the Convention as it was drafted. Thus, Senate approval conditioned on the adoption of an amendment would be tantamount to Senate rejection of the Convention. Furthermore, it is not necessary. Once the United States becomes a party to the Convention, it may invoke the procedures for amendment contained in Article XVI. If the full Senate wishes to see the Convention amended, it can direct the President to follow the steps set out in this article.

B. THE PROVISOS TO THE GENOCIDE CONVENTION ADOPTED BY THE COMMITTEE

The two reservations, five understandings and one declaration the Committee recommends are described below. The understandings that clarify the standard of intent required by Article II, that define mental harm, that part of the third understanding which relates to extraterritorial jurisdiction and the declaration on implementing legislation are similar or identical to ones recommended by the Committee in previous years. The reservation affecting the jurisdiction of the International Court of Justice and that providing that the Constitution is supreme over the Convention as well as the understandings which address the international penal tribunal, armed conflicts and that part of the third understanding which covers U.S. extradition law have not been recommended before.

1. The World Court Reservation (Article IX)

That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.³

Analysis

Article IX of the Convention provides that disputes concerning the "application, interpretation or fulfillment" of the Convention are to

³ In regard to this reservation, the termination of the 1946 U.S. Declaration of acceptance of the Court's optional compulsory jurisdiction under Article 36(2) of its Statute (*see* 80 AJIL 163-65 (1986)) had not affected U.S. acceptance of the Court's jurisdiction under Article 36(1) of its Statute in "all matters specially provided for . . . in treaties and conventions in force."

be submitted to the International Court of Justice, also known as the World Court, at the request of any party to the dispute. The Committee's recommended reservation will prevent the Court from asserting jurisdiction over the United States under this article. The International Court of Justice will not have jurisdiction over the United States in disputes arising under the Convention to which the United States is a party without the specific consent of the United States. Consent could be granted subject to the other parties' agreement to certain terms governing the ICJ's adjudication. The specific consent of the United States, in writing, will be required for each separate submission of a dispute involving the United States.

2. The Constitutional Reservation

That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Analysis

The first eight articles of the Convention impose a number of obligations on each party. Some are clear on their face; others are open to interpretation. If any article is construed to require the United States to act in a way barred by the U.S. Constitution, the Committee's reservation will excuse the United States from the obligation. There can thus be no conflict between U.S. obligations under the Constitution and those under the Convention. In the event of a conflict, the latter will extend no farther than what is permitted by the U.S. Constitution.

The determination of what action is prohibited by the Constitution is to be made according to U.S. law. In each case, the reservation puts responsibility for making the decision on the officials of the appropriate branch of the U.S. Government. This is why the phrase "as interpreted by the United States" is included. It assures that the reservation will not be construed as permitting the International Court of Justice, or some other tribunal, to determine, using its own standards, what is and is not permitted by U.S. Constitutional law.

Discussion

This reservation is similar to a statement former Supreme Court Justice Arthur Goldberg made when, as United Nations Ambassador, he initialed another human rights treaty for the United States. Testifying before the Committee in 1979, Ambassador Goldberg explained that the Senate's adoption of this reservation in treaties like the Genocide Convention would serve merely to reiterate the position United States representatives at the U.N. have taken over the years. It simply puts other parties on notice that the United States is maintaining the position announced during negotiations. In his view, the reservation is unremarkable.

Its purpose is to avoid placing the United States in the position of having to choose between its obligations under the Constitution and those under the Convention. Not that there can be any question as to

which must be chosen. No treaty can override or conflict with the Constitution. The Constitution is paramount. *Reid v. Covert*, 354 U.S. 1 (1957).

Rather, the problem is that . . . Article 27 of the Vienna Convention on the Law of Treaties, which represents customary international law on this point, provides that no state may "invoke the provisions of its internal law as justification for its failure to perform a treaty." Internal law means a constitution as well as a statute. Thus, without the Committee's recommended reservation, were a conflict to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in default of its international obligation.

Article V of the Convention states that the parties must enact legislation "in accordance with their respective Constitutions." It is not certain whether this article refers solely to the procedures to be followed in passing legislation or whether it concerns the content of the legislation as well. If it includes the latter, the Convention by its terms would remove any chance for conflict between itself and the Constitution. However, the Committee felt that this matter was too important to leave to chance; thus it recommends a reservation.

Conflict is most likely to occur between the First Amendment's proscription on legislation abridging free speech and Article III's requirement that "direct and public incitement to commit genocide" be punished. The contours of the latter remain to be defined. In response to a request for an advisory opinion, or as a result of a proceeding under Article IX, the ICJ could interpret Article III in a way inconsistent with the First Amendment.

Nor would this be particularly surprising. The criminal laws of many countries ban speech related to crimes such as genocide on the theory that this deters the acts themselves. The framers of our Constitution, on the other hand, were of a different view. As Justice Brandeis has reminded us, they thought that:

discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . that the fitting remedy for evil counsels . . . is good ones; [and that] believing in the power of reason as applied through public discussion, they eschewed silence coerced by law. . . . *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

The Genocide Convention is unique among the treaties the Committee has reviewed in that it touches upon such fundamental matters as the relationship between criminal law and the right of free speech. No other type of treaty, be it one of friendship and commerce, taxation or the like, raises these kinds of issues. Accordingly, unlike any other treaty that has come before the Senate, the Committee finds that a Constitutional reservation is appropriate.

In lieu of adding a Constitutional reservation, it has been suggested that the United States wait and see whether the Convention will give rise to an obligation in conflict with the Constitution. If it does, it is said, the United States can, at that time, either resolve the conflict or

terminate its treaty obligations. The Committee does not find this approach to be consistent with a respect for international law. The Committee takes U.S. obligations under international law seriously. A corollary to this is that the Committee does not believe the United States should commit itself in advance to obligations it may not be able to meet.

The Committee reservation may never be invoked. Article V may be interpreted to apply to substance as well as form. The other articles may never be construed in a way inconsistent with the U.S. Constitution. Nonetheless, the Committee believes that prudence, as well as due regard for the obligations imposed by international law, recommends the reservation.

3. The Specific Intent Understanding

That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II means the specific intent to destroy, in whole or substantial part, a national, ethnical, racial, or religious group as such by the acts specified in Article II.

Analysis

Under Article II, genocide is any one of five enumerated acts provided the act is committed with the "intent to destroy, in whole or in part" a protected group. This understanding makes clear that the type of intent referred to is specific intent. It also makes plain that where the act is aimed at the destruction of less than the whole group, it must be directed at a large enough number of individuals such that their loss would destroy the group as a viable entity.

Discussion

The purpose of this understanding is to distinguish between the crime of genocide and other acts. It does so by specifying the type of intent that must be present for an act to constitute genocide and by requiring that an act be aimed at destroying the group as a viable entity. It is similar to one the Committee has recommended in the past. It was approved unanimously.

This understanding carefully delineates the acts that constitute genocide. One might ask why there is a need for such precision. After all, massive acts of violence directed at individuals because of their membership in a particular national, ethnic, racial or religious group would seem to be easily discernible.

The answer is that over the years the true meaning of the word genocide has been debased. The charge of genocide has come to be levelled against virtually any action with which the accuser disagrees. Raphael Lemkin, a Polish legal scholar, coined the term to describe what was happening to Jews in Nazi-occupied Europe. His purpose was to focus the outrage of all civilized people on the commission of such atrocities. The Committee hopes its own actions will help restore the meaning Lemkin intended.

4. The Mental Harm Understanding

That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques.

Analysis

Article II(b) of the Convention requires each party to punish individuals who, with the specific intent to destroy a protected group in whole or substantial part, "cause serious bodily or mental harm" to group members. The Committee's recommended understanding clarifies the term mental harm in two ways. First, it insures that Article II is interpreted as banning only permanent harm. Acts which temporarily affect the mental faculties of group members are not covered. Second, it requires that the harm be the result of some physical intrusion into the body. Besides the injection of drugs, this would include electric shock and other acts which cause physical injury to mental faculties. Psychological harm resulting from living conditions, differential treatment by government authorities and the like is excluded.

Discussion

The offenses punishable under the Convention are those that outrage all civilized peoples. Acts causing mental harm might be construed to include a whole range of activities that, whatever else they may be, are not genocide. Attempts to read such lesser acts into the Convention would serve only to trivialize the true purposes of the Convention. The Committee understanding precludes such efforts.

5. The Extradition and Extraterritorial Jurisdiction Understanding

That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

Analysis

Article VII requires the parties to consider extradition requests for acts of genocide "in accordance with their laws and treaties in force." The first part of this understanding informs other signatories of a key part of U.S. extradition law. That part provides that an individual may not be extradited for acts which would not be a crime if committed within the United States. Before extradition can be granted, it must be shown that the acts complained of, if true, would be a violation of U.S. law.

Article VI states that those accused of genocide are to be tried by a municipal court of the state where the act was committed. The second half of the Committee's understanding makes clear that this is not the only place where trial may be had. Any state may try its nationals for

acts of genocide regardless of where the acts took place. Were, for example, a United States citizen accused of genocidal acts abroad, the United States could meet its obligations under Article VI by prosecuting him under United States law.

Discussion

This understanding addresses two issues: extradition and extraterritorial jurisdiction. The first part, which restates a portion of present U.S. extradition law, is new. The second, affirming the right of a state to try its nationals for acts committed abroad, has been approved by the Committee in previous years. The Committee does not believe either to be controversial.

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6. The Armed Conflict Understanding

That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.

Analysis

No act constitutes genocide under Article II unless it is committed with the specific intent to destroy a protected group in whole or substantial part. The Committee's understanding affirms that this requirement applies even in a situation where there is an armed conflict. None of the acts that are part of such a conflict are to be considered genocide absent the requisite intent.

7. The International Penal Tribunal Understanding

That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.

Analysis

Article VI contemplates the possibility of the establishment at some future date of an international penal tribunal to try individuals accused of genocide. Creation of such a tribunal would require the negotiation of a new treaty or an amendment to the Convention. If a future President were to decide that the United States should adhere to such a treaty, or accept an amendment to the Convention, the Committee's understanding would require him to seek Senate advice and consent pursuant to Article II of the United States Constitution. Accession by an executive agreement would be barred. The Committee's understanding puts both future Presidents and the other parties to the Genocide Convention on notice that Senate consent will be required before the United States can participate in any such tribunal.

Discussion

The international penal tribunal contemplated by Article VI represents a sharp departure from the concepts contained in the Genocide Convention. The Convention is an agreement among the parties to make certain acts criminal under their municipal laws and to prosecute individuals accused of violating them. The notion of an international penal tribunal suggests the existence of a body of law separate from the municipal laws of the contracting parties. What this law would be and what procedures would govern in proceedings before the tribunal remain to be determined.

From time to time different organs of the United Nations have considered draft conventions establishing such a tribunal. The Committee is extremely skeptical of these efforts. It notes, among other things, that serious Constitutional objections to U.S. participation have been raised. Given the novelty of the concept and the fact that U.S. adherence would raise many legal and policy issues, U.S. agreement to a convention creating a penal tribunal should only be effected with the advice and consent of the Senate.

The method by which the United States would agree to the type of tribunal contemplated by Article VI is related to the Genocide Convention. The procedures the United States would follow in considering whether to participate is a matter of legitimate concern to the other contracting parties. It has international as well as domestic ramifications. Accordingly, the Committee has made this condition of Senate consent to ratification an understanding.

8. The Declaration on Implementing Legislation

That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

Analysis

By Article V, the parties must enact whatever legislation is required to make genocide and the other acts enumerated in Article III criminal under their respective domestic laws. The Committee's recommended declaration would condition ratification by the United States on passage of U.S. legislation giving the Convention effect. The declaration instructs the President to withhold depositing the instrument of ratification with the Secretary General of the United Nations until implementing legislation has become a part of U.S. law.

Discussion

This declaration was approved unanimously by the Committee. It is identical to one recommended in previous years. The Committee's declaration reinforces the fact that the Convention is not self-executing. In other words, no part of the Convention becomes law by itself. The Convention is effective only through legislation implementing its various provisions.

The declaration does not affect U.S. obligations under the Convention. Nor is it a statement of U.S. policy on matters related to the Convention. Rather, it addresses the domestic action that the Senate is requiring before ratification can go forward. For these reasons the Committee does not believe it necessary to include the declaration in the instrument of ratification.⁴

On February 19, 1986, the Senate also adopted, by 93 to 1, with 6 senators absent and not voting, Senate Resolution 347, expressing the sense of the Senate that, upon depositing the instrument of ratification to the International Convention on Prevention and Punishment of the Crime of Genocide with the Secretary-General of the United Nations, the President should notify the Secretary-General in writing of the desire of the United States to amend the Convention to include acts constituting political genocide within the definition of the term "genocide." The resolution further provided that the President should instruct the United States Permanent Representative to the United Nations to take all steps necessary to see that such an amendment would be adopted.⁵

JURISDICTION OVER VESSELS

(U.S. *Digest*, Ch. 6, §5)

Foreign Vessels in U.S. Ports

In a memorandum to Secretary of State George P. Shultz, dated October 27, 1985, the Legal Adviser of the Department of State, Abraham D. Sofaer, confirmed advice cabled earlier to the Secretary (at the United Nations, New York) that U.S. authorities had a clear right under domestic, treaty and customary international law to interview a potential defector from a Soviet grain ship "in a neutral environment."

One Miroslav Medvid, a seaman of reportedly Ukrainian origin, had apparently attempted to escape during the night of October 24-25, 1985 from the M/V *Marshal Konev*, a Soviet freighter, below New Orleans. Immigration and Naturalization Service Border Patrol officials in New Orleans had concluded that Medvid was not seeking political asylum in the United States and had released him to the *Konev's* U.S. shipping agent for return to the Soviet ship. The Department of State first learned of the incident some 13 hours after Medvid had been returned to the ship.

The U.S. Government also had the clear right to remove Medvid from the *Konev*, by force if necessary, the Legal Adviser stated, and any suggestion that the vessel was subject to exclusive Soviet jurisdiction was erroneous.

⁴ S. EXEC. REP. NO. 2, *supra* note 1, at 14-26.

⁵ 132 CONG. REC., *supra* note 2, at S1380. In introducing the resolution, Senator Robert J. Dole, the majority leader, pointed out that, by passing it, the Senate would make a strong statement "for the victims of Tibet, Cambodia, and Afghanistan" (referred to in the preamble) and "would reaffirm the position taken by the United States, but resisted by the Soviets . . . when the Convention was being written." Senator Dole also referred to President Reagan's support for such an amendment to the Convention, expressed in the President's letter to Senator Steve Symms, dated Feb. 19, 1986. *Id.*

The Legal Adviser's memorandum read in part:

Basic Statutory Authority

The basic legal authority for interviewing Medvid and detaining the *M/V Konev* is found in section 215 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1185 ("INA"), which provides in relevant part that:

- (a) Unless otherwise ordered by the President, it shall be unlawful
 - (1) for any alien to depart from . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;
 - (2) for any person to transport or attempt to transport from . . . the United States another person with knowledge or reasonable cause to believe that the departure . . . of such person is forbidden by this section.

Implementing Regulations

INA section 215 has been implemented by the Department of State in 22 CFR Part 46 and by the Immigration and Naturalization Service ("INS") in 8 CFR Part 215. In relevant part, these regulations empower the Executive temporarily to prevent the departure of any alien whose "departure would be prejudicial to the interests of the United States". 8 CFR 215.2(a).

Under 8 CFR 215.3(j) the departure of an alien "shall be deemed prejudicial to the interests of the United States where doubt exists whether such alien is departing or seeking to depart from the United States voluntarily. . . ."

Significantly, 8 CFR 215.2(c) permits us to require that the alien:

. . . be examined under oath . . . The departure control officer may permit certain other persons including officials of the Department of State and interpreters, to participate in such examination or inspection and may exclude from presence at such examination or inspection any person whose presence would not further the objectives of such examination or inspection. The departure-control officer shall temporarily prevent the departure of any alien who refuses to submit to such examination or inspection, and may, if necessary to the enforcement of this requirement, take possession of the alien's passport or other travel document.

It is a reasonable interpretation of this section that the departure control officer may determine the location of the interview and demand the alien's removal to that place, under force if need be.

The INS has issued a departure control order under 8 C.F.R. 215 prohibiting Medvid's departure from the United States.

U.N. Convention on Refugees

Additional legal (and humanitarian) support for forcible removal of Medvid is found in, e.g., the 1967 U.N. Protocol and Convention Re-

lating to the Status of Refugees, 19 UST 6223, TIAS 6577. Article 33(1) of the Convention provides that:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (19 U.S.T. 6276.)

Supreme Court Decisions

It is a well-established principle that U.S. authorities may exercise jurisdiction aboard foreign flag vessels in our internal waters regarding disorders "which disturb the public peace". *Wildenhus's Case*, 120 U.S. 1 (1887). The facts of this case demonstrate that the incident has disturbed the "peace of the port". In fact, reports that Medvid has been severely beaten and drugged in our view demand that U.S. law enforcement officials investigate possible criminal violations of U.S. law. While a flag state may exercise jurisdiction concerning matters proscribed by its domestic law occurring on the vessel (i.e., "concurrent jurisdiction") there is absolutely no basis for suggesting that the Soviets have exclusive jurisdiction over events occurring on the vessel.

Sovereign and Diplomatic Immunity

In L's view, the doctrines of foreign sovereign immunity and diplomatic immunity are not directly implicated here. The vessel is not "inviolable", and neither the master nor the crew enjoy diplomatic or other immunity from the civil or criminal jurisdiction of the United States.

U.S./USSR Consular Convention

Nor can the Soviets derive any comfort from the 1964 bilateral consular convention between our two countries, 19 U.S.T. 5018, TIAS No. 6503. To the contrary, it would appear that the U.S. has far exceeded its obligations under that agreement. See, e.g., Art. 13, which deals specifically with cases involving vessels of the sending state in the internal waters of the receiving state:

1. A consular officer may provide aid and assistance to vessels sailing under the flag of the sending state which have entered a port in his consular district.

2. *Without prejudice to the powers of the receiving state*, a consular officer may conduct investigations into any incidents which occurred during the voyage on vessels sailing under the flag of the sending state, and may settle disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the laws of the sending state. A consular officer may request the assistance of the competent authorities of the receiving state in the performance of such duties.

3. *In the event that the courts or other competent authorities of the receiving state intend to take any coercive action on vessels sailing under the flag of the sending state while they are located in the waters of the receiving*

state, the competent authorities of the receiving state shall, unless it is impractical to do so in view of the urgency of the matter, inform a consular officer of the sending state prior to initiating such action so that the consular officer may be present when the action is taken. Whenever it is impractical to notify a consular officer in advance, the competent authorities of the receiving state shall inform him as soon as possible thereafter of the action taken.

4. Paragraph 3 of this Article shall not apply to customs, passport, and sanitary inspections, or to action taken at the request or with the approval of the master of the vessel.

5. The term "vessel", as used in the present Convention, does not include warships. [Emphasis supplied]

NB: Article 13(3) expressly contemplates coercive action by U.S. authorities. This fact alone in our view puts our proposed use of force to remove Medvid on a firm legal footing.

Miscellaneous Legal Considerations

Although *Wildenhus*, *supra*, is quite old, it is still good law and is cited as authority in contemporaneous U.S. court decisions. See, e.g., *Armament Deppe, S.A. v. U.S.*, 399 F.2d 794 (5th Cir. 1968) (Ainsworth, J.):

It is well settled that when a foreign-flag shipping line chooses to engage in foreign commerce and use American ports it is amenable to the jurisdiction of the United States and subject to the laws thereof. *The Schooner Exchange v. M'Faddon and Others*, 7 Cranch 116, 3 L.Ed. 287 (1813). This time-honored principle was reiterated in the "*Wildenhus's Case*," *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 11, 7 S.Ct. 385, 387, 30 L.Ed. 565 (1887), in the following language: "It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement. . . ." Later the Supreme Court said in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142, 77 S.Ct. 699, 701, 702, 1 L.Ed.2d 709 (1957), "It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. . . ." In *Lauritzen v. Larsen*, 345 U.S. 571, 592, 73 S.Ct. 921, 933, 97 L.Ed. 1254 (1953), it was held that Congress may "condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact." [*Id.* at 797]

Moreover, L is unaware of any multilateral or bilateral agreement concerning our maritime relations with the Soviet Union that would run counter to the foregoing principles.

It bears particular emphasis in the present circumstances that any interference, resistance or opposition by the Master of the *M/V Konev* or his crew to our removal of Medvid would be felonies under the federal criminal code. See, e.g., 18 U.S.C. 111, which provides as follows:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Significantly, the foregoing principles are in accord with longstanding Department of State views: For example, in the 1910 case of *The Serak*, where the authorities of Corinto, Nicaragua, requested the captain of the American steamship *City of Panama* to permit removal of a German doctor from the vessel, the State Department stated as follows:

1. Nations have, in general, the right to exercise, if they choose, civil and criminal jurisdiction over foreign merchant vessels entering their ports.

2. In practice, however, according to the so-called French modification of this rule, such jurisdiction is not generally exercised over matters which do not involve the "dignity of the country" or "the peace and tranquillity of the port". In the words of the United States Supreme Court in *Wildenhus' Case*: "Disputes which disturb only the peace of the ship or of those on board, are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed and, if need be, the offenders punished by the proper authorities of the local jurisdiction". This, however, is a matter of comity or of treaty stipulation and it is not generally regarded as a settled principle of international law.

3. Any country, consequently, may cause the arrest, by due process of law of any person of whatever nationality on board foreign merchant ships within its ports. The duty of the ship's master is not to resist the proper arrest of persons in such cases.

(II Hackworth, *Digest of International Law*, 224.)

Finally, with respect to precedential cases involving Soviet defectors, the L attorney who was on the scene in New York in arranging the interview with Soviet ballerina Lyudmila Vlasova confirms that the Departments of State and Justice had a contingency plan to use force in order to remove the potential defector from the Soviet aircraft. However, the plan was never implemented because the Soviets finally agreed to an interview in a mobile lounge.¹

In testimony on November 7, 1985, before the Subcommittee on Europe and the Middle East of the House Committee on Foreign Affairs, Ambassador Rozanne L. Ridgway, Assistant Secretary of State for European and Canadian Affairs, "underscored" the following three important points in the United States Government's role in the Medvid case:

¹ Dept. of State File No. P86 0043-1337.

- First, that from the moment we were informed of this case, our objective was clear and straightforward: to remove Seaman Medvid from the Soviet ship in order to interview him in a neutral, nonthreatening environment under our control to determine whether or not he wished to remain here or return to the U.S.S.R. The operating assumption of the Department of State, the Department of Justice and the White House was that Seaman Medvid's behavior in jumping from his ship and his resistance to being returned to it constituted presumptive evidence of his desire to remain in the United States.

- Second, that decisions taken in this case, including the final decision to permit Seaman Medvid to sign a statement and return to his ship, were made at the highest levels of the White House, the Department of State, and the Department of Justice.

- Third, that it is and will continue to be the general policy of the U.S. Government not to force individuals to return to a country where they would be persecuted on account of race, religion, ethnic origin, membership in a particular social group, or political opinion. This principle remained fully operative throughout our involvement in the case of Seaman Medvid.

At the conclusion of her prepared statement, Ambassador Ridgway commented:

In conclusion, I would like to underscore the fact that at every point in the Department of State's involvement in this case, our paramount concern was the welfare of Seaman Medvid. We were determined to ensure that he had an opportunity freely to express his preferences. Over a period of days, extraordinary measures were taken to ensure that he was given that opportunity, first aboard the U.S. Coast Guard cutter and then again at the U.S. naval facility after he had had a good night's rest. . . . From the outset there was always the possibility that Seaman Medvid might indicate that he wished to return to his ship and to the U.S.S.R. and that if he did so, we would have to respect that choice and whatever considerations led to that decision.²

AIR TRANSPORT AGREEMENTS

(U.S. *Digest*, Ch. 8, §2)

United States-USSR

By an exchange of notes at Washington on February 13, 1986, between Acting Secretary of State John C. Whitehead and Soviet Ambassador Anatoliy Dobrynin, the United States and the Union of Soviet Socialist Republics amended their Civil Air Transport Agreement with Annex, as amended, and their Agreement Supplementary to the Civil Air Transport

² DEPT. ST. BULL., No. 2106, January 1986, at 62, 64; *The Case of Miroslav Medvid: Hearing Before the House Comm. on Foreign Affairs and its Subcomm. on Europe and the Middle East on H. Res. 314*, 99th Cong., 2d Sess. 41-42, 50 (1985).

Agreement,¹ as amended, and opened the way for resumption of normal aviation relations between the two countries.

An amendment to Article 6 of the Civil Air Transport Agreement details specific measures necessary to ensure safe and effective operation of the agreed services: (1) mutual recognition of certificates of airworthiness, certificates of competency and licenses issued or validated by either party, the requirements for which at least equal the minimum standards established pursuant to the Convention on International Civil Aviation (the Convention);² and (2) provision for consultations between the parties on each other's safety standards relating to aeronautical facilities, air crew, aircraft and operation of the designated airlines, with a view toward effective maintenance and administration by each party of safety standards and requirements in those areas at least equal to Convention-established minimum standards; and if a party does not take appropriate corrective action, provision for the other party to withhold, suspend or revoke permission to operate the agreed services from the former's designated airline (i.e., pursuant to the provisions of Article 5 of the 1966 Civil Air Transport Agreement).

A new Article 6 *bis* to the Civil Air Transport Agreement requires the parties to provide all necessary aid to each other to prevent acts of unlawful seizure of aircraft and other unlawful acts against the safety of aircraft, airports and air navigation facilities and any other threat to aviation security. They must act in full conformity with the provisions of the (Hague) Convention for the Suppression of Unlawful Seizure of Aircraft,³ and the (Montreal) Convention for the Suppression of Acts against the Safety of Civil Aviation,⁴ as well as the aviation security provisions and regulations established by the International Civil Aviation Organization and designated as annexes to the Convention. Each party agrees to observe the security provisions required by the other for entry into its territory and to take adequate measures to protect aircraft and inspect passengers and their carry-on items, as well as cargo and aircraft stores prior to and during boarding or loading. When an incident or threat of an incident of unlawful seizure of aircraft or other unlawful acts against the safety of passengers, crew, airports and air navigation facilities occurs, the parties are to assist each other by facilitating communications and other appropriate measures to terminate the incident or threat rapidly and safely. Article 6 *bis* contains a consultation provision similar to that in Article 6: where a party has reasonable grounds to believe that the other has departed from the aviation security provisions set out in Article 6 *bis*, failure to reach a satisfactory agreement within 15 days of the request for consultations or an urgent threat to international civil aviation security constitutes grounds for the requesting party to withhold, suspend or revoke permission to operate the agreed services from the other party's designated airline (under Article 5 of the 1966 Agreement).

¹ Both Agreements signed Nov. 4, 1966, 17 UST 1909, 1936, TIAS No. 6135.

² Done Dec. 7, 1944, 61 Stat. 1160, TIAS No. 1591, 15 UNTS 295.

³ Signed Dec. 16, 1970, 22 UST 1641, TIAS No. 7192.

⁴ Signed Sept. 23, 1971, 24 UST 564, TIAS No. 7570.

Amendments to Articles 7 and 8 of the 1966 Civil Air Transport Agreement concern, respectively, imposition of user charges (not to exceed those imposed on a party's own or any other airlines operating similar international air transportation) and exemption, on the basis of reciprocity, from taxes, duties, fees and charges, and import restrictions for equipment, fuel, lubricants, consumable technical supplies, spare parts and aircraft stores.

Amendments to Article 9 of the Civil Air Transport Agreement relate to periods of visa validity, the number of complete aircraft crews permitted for each airline and airline employees stationed at points on the agreed routes. An amendment to Article 10 conforms documentary requirements to standards prescribed in the annexes to the 1944 Chicago Convention on International Civil Aviation. An amendment to Article 12 permits each designated airline to have representation at each of the two points on the agreed routes in the other party's territory, with a combined total of not more than six employees stationed at both points. In addition, each party grants the right of entry for short periods not exceeding 30 days to personnel required by the other party's designated airline for the normal conduct of its activities. An amendment to Article 14 simplifies currency conversion procedures.

The 1986 amendment to the 1966 Civil Air Transport Agreement in effect replaces the annex in its entirety. Under the amended annex, the carriers designated by the respective parties (for the United States, Pan American World Airways; for the Soviet Union, Aeroflot Soviet Airlines) will undertake (scheduled) air service between Washington/New York and Moscow/Leningrad. Carrier substitution is permitted, subject only to qualification of the substitute before the other party's aeronautical authorities under its normally applied laws.

The designated carriers may operate up to a maximum of four round-trip flights each per week. The agreed frequencies are based upon specified aircraft seat equivalency conversion factors; extra sections are not counted as frequencies but must be approved in advance by the other party's authorities. All scheduled flights, including extra sections, are subject to the (passenger revenue-sharing) provisions of the Balancing Mechanism contained in the appendix to the annex.⁵

ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §12)

Libya

Following terrorist attacks on December 27, 1985, at the Vienna and Rome airports (five Americans were killed at Rome), and because of convincing evidence of Libyan Government involvement with the Abu Nidal terrorist organization responsible for the attacks, President Ronald Reagan issued Executive Order No. 12543, "Prohibiting Trade and Certain Trans-

⁵ Dept. of State Files L/T.

actions involving Libya," dated January 7, 1986. In the order the President declared a national emergency to deal with the "unusual and extraordinary threat to the national security and foreign policy of the United States" caused by the policies and actions of the Government of Libya. At a news conference the same day, at which he announced his decision, the President stated: "By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if [Qaddafi] had used its own armed forces."¹ The executive order, he said, would "end virtually all direct economic activities between the United States or United States nationals and Libya."²

Section 1 of the order sets out eight categories of prohibited actions or transactions, the first five having been made effective as of February 1, 1986; and the last three having been made effective immediately. Their effect was to impose a total ban on direct import and export trade with Libya, except for humanitarian purposes, and to prohibit commercial contracts and other transactions with Libya, including travel-related transactions or activities, except travel for journalistic activities or to carry out the purposes of the order. The text of section 1 of the order follows:

Section 1. The following are prohibited, except to the extent provided in regulations which may hereafter be issued pursuant to this Order:

(a) The import into the United States of any goods or services of Libyan origin, other than publications and materials imported for news publications or news broadcast dissemination;

(b) The export to Libya of any goods, technology (including technical data or other information) or services from the United States, except publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies intended strictly for medical purposes;

(c) Any transaction by a United States person relating to transportation to or from Libya; the provision of transportation to or from the United States by any Libyan person or any vessel or aircraft of Libyan registration; or the sale in the United States by any person holding authority under the Federal Aviation Act of any transportation by air which includes any stop in Libya;

(d) The purchase by any United States person of goods for export from Libya to any country;

(e) The performance by any United States person of any contract in support of an industrial or other commercial or governmental project in Libya;

(f) The grant or extension of credits or loans by any United States person to the Government of Libya, its instrumentalities and controlled entities;

(g) Any transaction by a United States person relating to travel by any United States citizen or permanent resident alien to Libya, or to

¹ 22 WEEKLY COMP. PRES. DOC. 22 (Jan. 13, 1986), *reprinted in* 25 ILM 175 (1986).

² *Id.*

activities by any such person within Libya, after the date of this Order, other than transactions necessary to effect such person's departure from Libya, to perform acts permitted until February 1, 1986, by Section 3 of this Order, or travel for journalistic activity by persons regularly employed in such capacity by a newsgathering organization; and

(h) Any transaction by any United States person which evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this Order.

For purposes of this Order, the term "United States person" means any United States citizen, permanent resident alien, juridical person organized under the laws of the United States or any person in the United States.³

On January 8, 1986, President Reagan issued Executive Order No. 12544, "Blocking Libyan Government Property in the United States or Held by U.S. Persons," which read in part:

By the authority vested in me as President by the Constitution and laws of the United States, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) and section 301 of title 3 of the United States Code, in order to take steps with respect to Libya additional to those set forth in Executive Order No. 12543 of January 7, 1986, to deal with the threat to the national security and foreign policy of the United States referred to in that Order,

I, RONALD REAGAN, President of the United States, hereby order blocked all property and interests in property of the Government of Libya, its agencies, instrumentalities and controlled entities and the Central Bank of Libya that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons, including overseas branches of U.S. persons.⁴

On February 7, 1986, the Department of State released two announcements regarding implementing procedures, respectively, for: (1) treatment of American family members of Libyan nationals remaining in Libya; and (2) divestiture of assets owned by Americans in Libya.⁵

³ 51 Fed. Reg. 875-76 (1986).

⁴ 51 Fed. Reg. 1235 (1986).

For the Libyan Sanctions Regulations issued by the Office of Foreign Assets Control, Department of the Treasury, in implementation of Executive Order Nos. 12543 and 12544 on Jan. 8 and 14, 1986, respectively, see *id.* at 1354-59 and 2462-67.

For the General Order under the Export Administration Regulations regarding restrictions on exports involving Libya, 15 C.F.R. 390.7, and related amendments to 15 C.F.R., pts. 385 and 390, issued by the Export Administration, International Trade Administration, Department of Commerce, on Jan. 14, 1986, see *id.* at 2353-54, *reprinted in* 25 ILM at 197-98.

⁵ Dept. of State File Nos. P86 0054-1796 and 0054-1797.

USE OF FORCE

(U.S. *Digest*, Ch. 14, §1)*Self-Defense against Terrorism*

On April 21, 1986, the United States, the United Kingdom and France vetoed a revised draft Security Council resolution¹ put forward by certain nonaligned states (Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates), that, among other things, would have condemned the U.S. air strikes ("armed attack") against Libya on April 14, 1986, as a violation of the United Nations Charter and the norms of international conduct.

In accordance with Article 51 of the UN Charter, the United States had reported to the Security Council immediately after the air strikes that it had exercised its (inherent) right of self-defense under Article 51 to an ongoing pattern of attacks by the Libyan Government against U.S. nationals; the most recent, a bombing in West Berlin, had resulted in the death of one U.S. soldier and injury to a large number of other American servicemen.

The report, in the form of a letter from Ambassador Herbert S. Okun, the Acting United States Permanent Representative, to the President of the Security Council, dated April 14, 1986, read:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised the United States right of self-defense by responding to an ongoing pattern of attacks by the Government of Libya. As stated by President Reagan on April 14, "self-defense is not only our right; it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter."

¹ UN Doc. S/18016/Rev.1 (1986). The vote on the draft resolution was 9 in favor, 5 against (Australia and Denmark in addition to the vetoing permanent members), and 1 abstention. UN Doc. S/PV.2682, at 43 (1986). In explaining the U.S. vote, Ambassador Walters stated:

I wish to stress only this: If the inherent right of self-defence, specifically recognized in article 51 of the Charter, does not include the right to protect one's nationals and one's ships, what does it protect? The idea that a State should be condemned for seeking to protect the lives of its nationals who are subject to armed attack is too absurd for further comment.

What do we find in this draft resolution before us? We see a harmful and potentially disastrous approach that equates the use of terrorism with an act of justified self-defence against terrorism; an approach that condemns acts of the United States against Libya but ignores totally Libya's documented, open, undeniable use of terrorism; an approach that perverts the meaning and intention of the Charter of the United Nations and international law; and, finally, an approach that creates an appearance of even-handedness, but not the reality. Nowhere is Libya asked to refrain from its murderous activities.

. . . We are not dealing here with the acts of individuals or groups, but rather with a State policy to use force by clandestine means or, as one speaker in the debate put it, "war by another name". . . .

Id. at 31-32; U.S. Mission to the United Nations [USUN] Press Release 34(Rev.1)(86), Apr. 23, 1986.

Over a considerable period of time Libya has openly targeted American citizens and U.S. installations. The most recent instance was in West Berlin on April 5, where Libya was directly responsible for a bombing which resulted in the death of one U.S. soldier and injury to a large number of American servicemen and other persons.

The United States exercised great care in restricting its military response to terrorist-related targets. It took every possible precaution to avoid civilian casualties and to limit collateral damage. The United States objective was to destroy facilities used to carry out Libya's hostile policy of international terrorism and to discourage Libyan terrorist attacks in the future. These facilities constituted essential elements which have enabled Libyan agents to carry out deadly missions against U.S. installations and innocent individuals.

The Libyan policy of threats and use of force is in clear violation of Article 2(4) of the United Nations Charter. It has given rise to the entirely justifiable response by the U.S.

The Government of the United States views with grave concern the Libyan practice of threats and use of force in violation of the Charter. In view of the gravity of Libya's action, and the threat that this poses to the maintenance of international peace and security, I ask that you circulate the text of this letter as a document of the Security Council.²

The Security Council took up the question of the U.S. air strikes against Libya on April 15, in response to letters of the same date from Libya, Burkina Faso, Syria and Oman. A statement before the Council by Ambassador Vernon A. Walters, the United States Permanent Representative, follows, in part:

On April 14, in exercise of the inherent right of self-defense recognized in Article 51 of the Charter of the United Nations, United States military forces executed a series of carefully planned air strikes against terrorist-related targets in Libya. Those strikes have been completed and the United States aircraft have returned to their bases.

United States forces struck targets that were part of Libya's military infrastructure—command and control systems, intelligence communications, logistics and training facilities. Those are the sites used to carry out Libya's harsh policy of international terrorism, including ongoing attacks against United States citizens and installations. This necessary and proportionate action was designed to disrupt Libya's ability to carry out terrorist acts and to deter future terrorist acts by Libya. In carrying out this action, the United States took every possible precaution to avoid civilian casualties and to limit collateral damage.

The United States took these measures of self-defense only after other repeated and protracted efforts to deter Libya from its ongoing attacks against the United States in violation of the Charter. But when quiet diplomacy, public condemnation, economic sanctions and demonstrations of military force failed to dissuade Colonel Qaddafi, this self-defense action became necessary. As stated by President Reagan

² UN Doc. S/17990 (1986).

on April 14, "Self-defense is not only our right; it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter."

And may I now quote Colonel Qaddafi? On March 24, Colonel Qaddafi said, "This is not the time for speaking; it is the time for confrontation and for war." On March 2, 1984, long before these incidents occurred, speaking in the People's Hall in Tripoli, he said, "We must force America to fight on 100 fronts."

The murderous violence of recent Libyan attacks makes clear why the United States had to act. There is direct, precise and irrefutable evidence that Libya bears responsibility for the bombing in West Berlin on April 5 that resulted in the deaths of Army Sergeant Kenneth Ford and a young Turkish woman and injury to 230 other people, among them 50 American military personnel. That brutal atrocity was but the latest in Colonel Qaddafi's campaign of terror. More than a week before the attack, orders were sent from Tripoli to the Libyan People's Bureau in East Berlin to carry out a terrorist attack against Americans, an attack designed to cause maximum and indiscriminate casualties. Libya's agents then planted the bomb. On April 4, the People's Bureau alerted Tripoli that the attack would be carried out the following morning. The next day, the People's Bureau reported back to Tripoli on the "great success" of the mission.

In the light of that reprehensible act of violence—only the latest in an ongoing pattern of attacks by Libya—and of clear evidence that Libya was planning a multitude of future attacks, the United States was compelled to exercise its right of self-defense. The United States hopes that this action will discourage Libyan terrorist acts in the future.

In addition to the evidence of direct Libyan involvement in the bombing of the West Berlin nightclub, the United States also has compelling evidence of Libyan involvement in other planned attacks against the United States in recent weeks, several of which were designed to cause maximum casualties, similar to the Berlin bombing.

In late March, Turkish police arrested two people in Istanbul who claimed they were to conduct terrorist operations against the United States in Turkey on behalf of the Libyans, again designed to inflict maximum casualties.

On March 25, my Government notified the Council, in accordance with Article 51 of the Charter of the United Nations, that the United States, in the exercise of its inherent right of self-defense, had ordered its forces to respond to hostile Libyan military attacks in international waters in the Gulf of Sidra.³

³ From Mar. 23 to 25, 1986, U.S. forces exercised freedom of navigation and overflight rights under international law on and over the high seas in the Gulf of Sidra. In response to attacks from Libyan missile installations, the U.S. forces took limited measures of self-defense necessary to protect themselves from continued attack. President Reagan reported the matter to Congress in identical letters dated Mar. 26, 1986, to Speaker of the House Thomas P. O'Neill, Jr., and Senator Strom Thurmond, President pro tempore of the Senate. For the text, see 22 WEEKLY COMP. PRES. DOC. 423 (Mar. 31, 1986).

France expelled two members of the Libyan People's Bureau in Paris for their involvement in a planned attack on visa applicants waiting in line at the Embassy on March 28.

Six days later, France expelled two Fatah Force 17 members recruited by Libya to conduct another operation against the United States in Paris.

On April 6, a Libyan plot to attack the United States Embassy in Beirut resulted in a near miss by a 107-millimeter rocket which exploded on launch.

At the time we acted, the Libyan People's Bureau in Vienna was in the process of plotting a terrorist operation against an unknown target on April 17.

We have evidence that Libya is planning widespread attacks against Americans over the next several weeks, in Europe, Africa, Latin America and the Middle East. In addition, Libya has publicly pledged to attack the United States and its citizens. As Winston Churchill once said under similar circumstances: "Whose dogs do they think we are, that they can kill Americans with impunity?"

In sum, at issue here are Libya's unjustified use of force in attacking United States forces in the Gulf of Sidra last month in clear violation of Article 2(4) of the Charter . . . and Libya's admitted, continued policy of terrorist threats and the use of force, in violation of . . . Article 2(4) of the Charter.

That policy is directed not only against the United States, but includes repeated Libyan threats, calls for terrorist action, and acts of aggression and subversion against its neighbors, against European countries and against places as far away as Northern Ireland, the Philippines and Central America.

In a document drawn up on Monday, April 14, the members of the European Community recognize Libyan terrorist activities and indicate the measures they plan to take to combat those activities. It is no longer a question of who is doing it: it is clear who is doing it.

In the United States statement to the Council on April 14, we referred to the persistent course of conduct by Libya in violation of Article 2(4) of the United Nations Charter and in flagrant violation of the most fundamental rules of international law. The scourge of Libyan terrorism is not a problem for the United States alone. It threatens all members of the civilized world community. It challenges all members of this Council to give meaning to their commitment to uphold the principles of the Charter and to act in common defense of those principles.

Colonel Qaddafi's rhetoric and actions are not only anti-American. His support for terrorist violence is far-ranging and worldwide; his victims are of many nationalities. More than 40 so-called Libyan diplomats have been expelled from Western Europe since 1983 for involvement in criminal activities. Terrorist attacks by Libyan henchmen have ranged from the bloody outrages at Rome and Vienna airports, to the hijacking of an Egyptian airliner to Malta, to the streets of Bonn, where two Germans were wounded during an attack on an anti-Qaddafi

dissident, to the murder of a British policewoman doing her duty outside the Libyan People's Bureau in London.

Closer to home, the regime of Colonel Qaddafi has repeatedly sought to subvert its African and Arab neighbors: Chad, Egypt, Tunisia and the Sudan have all felt Qaddafi's sting. The policy pursued by Libya is nothing but a consistent violation of Article 2(4) of the Charter.

It is hypocrisy to equate the answer to terrorism with terrorism: it is equating crime with those who fight crime. It is clear that the international community as a whole suffers from Colonel Qaddafi's disrespect for accepted international norms of behavior. He has abused diplomatic privilege for terrorist purposes; he has reneged on international agreements and has blatantly used violence against political opponents. In sum, he has made terrorism an integral part of his foreign policy. Libyan attacks are not simply the random use of violence, but concerted violence directed against the values, the interests and the democratic institutions of all freedom-loving states. They are a clear assault on international order; an assault on the Charter of the United Nations and the principles which we as members of the Council are pledged to defend. Let us not shrink from this challenge.⁴

(U.S. Digest, Ch. 14, §8)

Self-Defense against Terrorism—War Powers Resolution

In testimony on April 29, 1986 before the Subcommittee on Arms Control, International Security and Science of the House Committee on Foreign Affairs, the Legal Adviser of the Department of State, Abraham D. Sofaer, discussed the War Powers Resolution in the context of recent events and situations that, he observed, bore no resemblance to the Vietnam War, in whose shadow it had been enacted and that, in fact, may not even have been contemplated at the time of its adoption.

In addressing the requirements under the resolution for consultation ("in every possible instance"), reporting and termination of the use of U.S. armed forces, the Legal Adviser noted that the resolution did not define the nature of the consultations required, that it left to the President's determination how consultations were to be carried out and that it expressly contemplated that consultation in a particular case would depend on the prevailing circumstances. Nevertheless, he pointed out, both before and after adoption of the resolution, the executive branch had "engaged in consultations with the Congress in a variety of circumstances involving the possible deployment of United States forces abroad."¹ Thus, the Legal Adviser continued,

[c]onsultations have occurred in cases where the Resolution might have been thought to require them and in cases where it clearly would not (and the Executive Branch has typically been careful to preserve its

⁴ USUN Press Release 29(86), Apr. 15, 1986; UN Doc. S/PV.2674 (1986).

¹ BUREAU OF PUBLIC AFFAIRS, DEPARTMENT OF STATE, CURRENT POLICY NO. 832, THE WAR POWERS RESOLUTION AND ANTITERRORIST OPERATIONS 1 (1986) (Statement of Legal Adviser Abraham D. Sofaer, Apr. 29, 1986).

position on these matters when consulting). The purpose of such consultations is to keep the Congress informed, to determine whether the Congress approves of a particular action or policy, and to give the Congress an opportunity to provide the President with its views, especially where it may disagree with the policy. Consultations are not intended to involve the Congress in reviewing the detailed plans of a military operation. The degree to which the President is implementing a policy of which the Congress is well aware and which it has already approved in principle is one important factor to be considered in determining the nature and timing of consultations.

In practice, the form and substance of consultations have depended upon the circumstances of each case. In some instances, such as the introduction of U.S. forces into Egypt to participate in peacekeeping operations, or the case of the Vietnam evacuation, the situation permitted detailed consultations well in advance of the action contemplated. In the case of the Tehran rescue mission, prior consultation was not possible because of extraordinary operational needs.²

The Legal Adviser then discussed the reporting requirement of the resolution and went on to examine constitutional issues presented by certain of its provisions:

Section 4 of the Resolution requires that the President submit, within 48 hours after the introduction of U.S. forces, a written report to the Congress in three circumstances. A report must be submitted when U.S. forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." In addition, a report must be submitted when U.S. forces are introduced "into the territory, airspace or waters of a foreign nation, while equipped for combat" (with certain specified exceptions), or when such forces are introduced "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. . . ."

Both Republican and Democratic Presidents have provided written reports to the Congress with respect to U.S. deployments abroad as a means of keeping the Congress informed, while reserving the Executive Branch's position on the technical applicability and constitutionality of the Resolution. Reports were submitted by President Ford in connection with the Indochina evacuations and the Mayaguez incident and by President Carter in connection with the Tehran rescue mission. During the Reagan administration, reports were submitted with respect to U.S. participation in the Multinational Force and Observers in the Sinai and the Multinational Force in Lebanon, the deployment of U.S. aircraft in connection with the situation in Chad, and the introduction of U.S. forces into Grenada. More recently, a report was submitted concerning the encounter with Libyan forces during U.S. military exercises in and near the Gulf of Sidra in late March, and a report was submitted with respect to the April 14 operation against Libya. Indeed, the Executive Branch has provided information to the Congress in many cases where no relevant statutory requirement existed.

² *Id.*

Section 5 of the Resolution provides that within 60 days after a report is submitted or required to be submitted, the President must terminate the use of U.S. forces unless the Congress has declared war or specifically authorized the use of such forces, has extended the 60-day period or is physically unable to meet as a result of an armed attack on the United States. The section also provides that the President must remove U.S. forces from engagement in hostilities abroad "if the Congress so directs by concurrent resolution." The legislative veto provision of the Resolution cannot stand in the face of the Supreme Court's 1983 decision in *INS v. Chadha* [462 U.S. 919 (1983)].

The Executive Branch has historically differed with the Congress over the wisdom and constitutionality of the 60-day provision of section 5. As President Reagan made clear in signing the Multinational Force in Lebanon Resolution on October 12, 1983 [50 U.S.C. §1541 note], the imposition of such arbitrary and inflexible deadlines creates unwise limitations on Presidential authority to deploy U.S. forces in the interests of U.S. national security. Such deadlines can undermine foreign policy judgments, and adversely affect our ability safely and effectively to deploy U.S. forces in support of those judgments. Moreover, the President's constitutional authority cannot in any event be impermissibly infringed by statute. Section 8(d) of the Resolution itself makes clear that the Resolution was not intended to alter the constitutional authority of the President. The President has constitutional power, as Commander-in-Chief and as the nation's principal authority for the conduct of foreign affairs, to direct and deploy U.S. forces in the exercise of self-defense, including the protection of American citizens from attacks abroad. From the time of Jefferson to the present, Presidents have exercised their authority under the Constitution to use military force to protect American citizens abroad.

I would also mention that serious constitutional problems exist with respect to section 8(a) of the Resolution, which purports to limit the manner in which the Congress may in the future authorize the use of U.S. forces. I do not believe that one Congress by statute can so limit the constitutional options of future Congresses. Nor can Congress control the legal consequences of its own actions. If a particular congressional action constitutes legal authority for the President to undertake a specific operation, I doubt that one Congress can change that fact for all future times by requiring a specific form of approval.³

The Legal Adviser next turned to instances in which United States forces might be, or had been, deployed, and set out reasons for excluding such instances from the purview of the War Powers Resolution. The major portion of his analysis follows:

It is a regrettable reality in today's world that Americans abroad are increasingly subjected to murder, kidnappings and other attacks by terrorists who seek to further their political ends through such means. The hijacking last year of TWA Flight 847, with the murder of Navy diver Stethem, is a well-known recent example. In that case, we had no reason to believe that the Government of Lebanon had encouraged

³ *Id.* at 1-2.

or otherwise supported the terrorists: it was simply unable to control them. In such a situation, the President may decide to deploy specially-trained anti-terrorist units in an effort to secure the release of the hostages or to capture the terrorists who perpetrated the act. Does the War Powers Resolution require consultation and reporting in this kind of situation?

We have substantial doubt that the Resolution should, in general, be construed to apply to the deployment of such anti-terrorist units, where operations of a traditional military character are not contemplated and where no confrontation is expected between our units and forces of another State. To be sure, the language of the Resolution makes no explicit exception for activities of this kind, but such units can reasonably be distinguished from "forces equipped for combat" and their actions against terrorists differ greatly from the "hostilities" contemplated by the Resolution.

Nothing in the legislative history indicates, moreover, that the Congress intended the Resolution to cover deployments of such anti-terrorist units. These units are not conventional military forces. A rescue effort or an effort to capture or otherwise deal with terrorists, where the forces of a foreign nation are not involved, is not a typical military mission, and our anti-terrorist forces are not equipped to conduct sustained combat with foreign armed forces. Rather, these units operate in secrecy to carry out precise and limited tasks designed to liberate U.S. citizens from captivity or to attack terrorist kidnappers and killers. When used, these units are not expected to confront the military forces of a sovereign State. In a real sense, therefore, action by an anti-terrorist unit constitutes a use of force that is more analogous to law enforcement activity by police in the domestic context than it is to the "hostilities" between States contemplated by the War Powers Resolution.

I might note, in this connection, that other types of cases involving military deployments, such as the movement of warships into or through foreign territorial waters, the deployment abroad of security personnel such as Marine Embassy guards, and transits of combat aircraft through foreign airspace, have generally been considered to be outside the scope of the Resolution. The rationale for regarding the Resolution inapplicable is at least as strong in the case of limited, anti-terrorist deployments as it is in these other cases, absent the involvement of the armed forces of a foreign State.

Even assuming the Resolution were applicable to the deployment of special anti-terrorist units, the fact is that consultations may not—and generally will not—be possible in such cases. The existence and purpose of these units is well-known to the Congress. The need for swiftness and secrecy inherent in the nature of those activities is so extraordinary that consultations prior to deployment might well jeopardize the lives of our units and the hostages they may seek to liberate.

Issues under the War Powers Resolution have also been raised where U.S. forces have engaged in a military exercise in conformity with international law. The incident in the Gulf of Sidra in late March illustrates the situation. Does the Resolution require the President to consult and report in this kind of case?



Some factual background will help to put this question in perspective. The United States is committed to the exercise and preservation of navigation and overflight rights and freedoms around the world. That is the purpose of the Freedom of Navigation program. A deliberate decision was made during the Carter Administration to discourage or negate unlawful claims to extended jurisdiction in the oceans. That policy was affirmed in 1982 under President Reagan, and in 1983 the essence of the policy became public in a statement on U.S. oceans policy. That statement made clear that the United States would continue to work with other countries to develop an acceptable oceans regime. It also made clear that the United States would protest the unilateral acts of other States designed to restrict the rights and freedoms of the international community in the use of the oceans, and that the United States would exercise and assert those rights and freedoms on a world-wide basis.

The exercise of our rights provides visible and powerful evidence of our refusal to accept unlawful claims. The United States has accordingly protested and exercised rights and freedoms with respect to claims of various kinds: unrecognized historic waters claims, territorial sea claims greater than 12 nautical miles, and territorial sea claims that impose impermissible restrictions on the innocent passage of any type of vessels (such as requiring prior notification or permission). Since the policy was established the United States has exercised its rights against the objectionable claims of over 35 countries, including the Soviet Union, at a rate of about 30 to 40 freedom of navigation exercises per year.

The United States has followed this policy in connection with Libya. When Qadhafi came to power in Libya, it was not long before private firms saw their interests expropriated. Then, on October 9, 1973, Qadhafi broadened the scope of his interest in expropriating the rights of others, and asserted his claim to ownership of the Gulf of Sidra. The United States vigorously protested that assertion on February 11, 1974, and in the years since then we have exercised our rights in that area on numerous occasions.

The War Powers Resolution was not intended to require consultation before conducting maneuvers in international waters or airspace in the context of this global Freedom of Navigation program. We are aware of no previous suggestion that the Resolution would require consultation in such situations. This question was carefully considered in connection with the Sidra exercise in March, and the decision was made that the conduct of those operations did not place U.S. forces into hostilities or into a situation in which imminent involvement in hostilities was "clearly indicated by the circumstances." The United States has conducted its exercises not only in Sidra but around the world, not only in March but for years—and in most instances without hostile response. We have in fact been in the Gulf of Sidra area 16 times since 1981, and we have crossed Qadhafi's so-called "line of death" 7 times before the operation last March. Only once before did Qadhafi respond with military action, and in that instance he was singularly unsuccessful. While we must always be aware of the risks and be prepared to deal with all contingencies, we have every right to expect that neither Libya nor any other country will take hostile action against U.S. forces while

they are lawfully in and over areas of the high seas. The threat of a possible hostile response is not sufficient to trigger the consultation requirement of section 3, which refers only to actual hostilities and to situations in which imminent involvement in hostilities is "clearly indicated" by the circumstances.

Where a peaceful, lawful exercise does in fact result in hostile action to which U.S. forces must respond in immediate self-defense, such an isolated engagement should not normally be construed as constituting the introduction of U.S. armed forces into a situation of actual or imminent hostilities for the purpose of the reporting requirement of section 4 of the Resolution. No report was submitted in the case of the 1981 Sidra incident, in which two Libyan aircraft were shot down after they fired at U.S. aircraft. Similarly, during the period in which U.S. peacekeeping forces were deployed in the Beirut area in 1983, many incidents occurred in which hostile forces attacked and U.S. peacekeeping forces responded in immediate self-defense. Yet, no separate War Powers report was submitted for each of these incidents. Of course, a different situation might be presented if U.S. forces withdrew from an area and subsequently returned for the purpose of undertaking further military action.

As a practical matter, however, this question seems academic. In the case of the March incident in the Gulf of Sidra, for example, regardless of the applicability of the War Powers Resolution, the Administration provided Congress with all the information it needed to review the incident. As soon as hostile Libyan actions occurred, the Administration took steps to ensure that Congress was informed of the situation and was kept informed throughout the remainder of the exercise. In particular, several calls were made to congressional leaders to inform them of the events; extensive briefings were conducted for the benefit of all interested members, at which experts from the Departments of State and Defense provided pertinent information and responded to all questions asked by members, and the President sent a written report to Congress describing the events of March 24 and 25, the actions taken by U.S. forces, and the legal justification for those actions.

The third kind of situation in which War Powers considerations have been raised recently is that in which U.S. forces take legitimate action in self-defense against facilities or forces of another State because of its sponsorship of terrorist attacks against Americans. In the April 14 operation against Libya, U.S. forces undertook military action in self-defense against five terrorist-related targets in order to preempt and deter Libya's unlawful aggression through terrorist force against the United States and its nationals. Does the War Powers Resolution apply to a case of this kind?

The use of U.S. forces to conduct a military strike against the facilities of a hostile, sovereign State in its own territory falls within the specific terms of the consultation requirement of section 3 of the Resolution. In this context, however, a critical element is flexibility. As indicated earlier, section 3 expressly envisions the possibility that in some instances the President might have to act without prior consultations. In any event, he must seek to consult in a manner appropriate to the circumstances, and the need for swiftness and secrecy in carrying out a military

operation is a vital factor to be weighed in determining the nature and timing of consultations that may be appropriate in a given situation.

In the case of the April 14 operation, extensive consultations occurred with congressional leaders. They were advised of the President's intention after the operational deployments had commenced, but hours before military action occurred. This satisfied the Resolution's requirement that consultation occur "before" the "introduction" of troops into hostilities or a situation of imminent hostilities. Congressional leaders had ample opportunity to convey their views to the President before any irrevocable actions were taken (in fact, no one who was consulted objected to the actions undertaken). The President took a serious risk in conducting these consultations. The press observed legislative leaders entering the White House for the consultations, and speculation about possible military action ensued. The press also learned immediately after the consultations that the President was to make an address later that evening, and this led to rumors of imminent military action that could have jeopardized the success of the operation.

The consultations in this case were consistent with the provisions of the War Powers Resolution. They were also consistent with and in many respects exceeded in scope and depth the consultations conducted on previous occasions. For example, President Ford's meeting with congressional leaders to discuss the Mayaguez operation occurred at a point in time much closer to the onset of military action than was the case here. President Carter, as I noted earlier, did not consult at all prior to the Tehran rescue mission.

Where a military action constitutes the introduction of U.S. forces into actual or imminent hostilities for the purpose of the consultation requirement of section 3 of the Resolution, the action also triggers the reporting requirement of section 4. In the case of the April 14 operation, the President submitted a full report consistent with the War Powers Resolution. As the President noted in his report, the actions taken were pursuant to his authority under the Constitution, including his authority as Commander-in-Chief. That authority is most compelling in a situation such as this, where the use of force is essential to deter an immediate and substantial threat to the lives of Americans.

In recent weeks the question has been raised publicly as to the President's right to take military action without the express approval of Congress. This is a question that has been addressed by Executive Branch officials on many occasions over the years, and their statements are well-known to this Committee. Without going into the specifics of those statements, it is clear that the limited actions undertaken by President Reagan in response to attacks on the United States and its citizens fall well within the President's authority under the Constitution. As noted earlier, the War Powers Resolution does not confer power on the President, but it clearly recognizes that the President has independent constitutional authority to take appropriate military action.

It is also important to note, in this regard, that the President is not simply acting alone, under his inherent constitutional authority, when taking the types of actions we are discussing today. The Congress has, over the years, learned of, considered, and effectively endorsed in principle the use of U.S. forces for a variety of purposes through its adoption

of laws and other actions. Most significantly, Congress has authorized and appropriated money for the creation of forces specifically designed for anti-terrorist tasks. For example, section 1453 of the 1986 Department of Defense Authorization Act specifically states that it is the duty of the government to safeguard the safety and security of U.S. citizens against a rapidly increasing terrorist threat, and that U.S. special operations forces provide the immediate and primary capability to respond to such terrorism; and the Congress has appropriated funds for the specific purpose of improving U.S. capabilities to carry out such operations. Likewise, the Congress has appropriated considerable sums to create the naval and air forces that are needed to respond to and deter state-sponsored terrorist attacks in the manner that was done on April 14, and to carry out the exercises necessary to maintain such capabilities and to assert and protect our rights on the high seas. In this sense, Congress has participated in the creation and maintenance of the forces whose function, at least in part, is to defend Americans from terrorism through the measured use of force. The President has openly discussed and explained the need for and propriety of these uses of force, which he has correctly assumed are widely supported by Congress and the American people. All of the actions undertaken were clearly signalled well in advance, and therefore posed no threat to the role of Congress under the Constitution in military and foreign affairs.⁴

Legal Adviser Sofaer summed up his presentation before the Subcommittee on Arms Control, International Security and Science, as follows:

It seems fair to say, in conclusion, that it is not clear how the War Powers Resolution, which was originally designed to provide an appropriate role for the Congress with respect to U.S. involvement in hostilities with other States, should apply to the use of U.S. forces in other kinds of situations. Some such situations—the deployment of anti-terrorist units—would seem to fall completely outside the scope of the Resolution. Other situations—the conduct of peaceful, lawful exercises which result in a hostile response—do not require consultations but, some might argue, may in special situations require a report. Still other cases—the use of U.S. forces in a legitimate, defensive strike against another State—can clearly be said to fall within both the consultation and the reporting provisions, but with the form of consultation necessarily varying with the particular circumstances.

A consideration of the application of the War Powers Resolution to situations such as these does more than raise difficult and inevitably controversial issues of interpretation. On a broader level, it also highlights some of the significant negative aspects of the War Powers Resolution, whose effects on the Congress are perhaps even more profound than on the Executive. The need that some members of Congress feel to defend the Resolution's viability, even in situations well beyond those contemplated at the time of its adoption, causes Congress to shift its concern, deliberations, and political leverage away from evaluating the merits of military actions to testing their legality, and to focus on formal and institutional issues rather than on the substance of our policies. Our history amply demonstrates that Congress has adequate means,

⁴ *Id.* at 2-4.

through the budgetary process and otherwise, to provide an effective check on Presidential power to employ military force. But the War Powers Resolution often unwisely diverts our leaders from issues of policy to issues of law.⁵

PRIVATE INTERNATIONAL LAW

(U.S. *Digest*, Ch. 15, §2)

Hague Convention on the Civil Aspects of International Child Abduction

Following President Reagan's transmittal to the Senate on October 30, 1985, of the Hague Convention on the Civil Aspects of International Child Abduction,¹ the Department of State forwarded to Senator Richard G. Lugar, Chairman of the Senate Committee on Foreign Relations, on January 31, 1986, a detailed legal analysis of the Convention, designed to assist the committee and the full Senate in considering it.

The Department of State decided that the President's letter of transmittal, Secretary Shultz's accompanying report of October 4, 1985, the Convention text, and the legal analysis should be made broadly available through publication in the *Federal Register* to parents, the bench and the bar, and to federal, state and local authorities, to help them in understanding the Convention and in resorting to, or implementing, it, in the event of U.S. ratification. The text of the legal analysis is found in Appendix C to the Department's Public Notice 957.²

⁵ *Id.* at 4.

¹ See 80 AJIL 342-44 (1986).

² 51 Fed. Reg. 10,494 (1986).

JUDICIAL DECISIONS

MONROE LEIGH

Delimitation of continental shelf between opposite coasts—Law of the Sea Convention—customary international law—application of equitable principles

CASE CONCERNING THE CONTINENTAL SHELF (LIBYAN ARAB JAMAHIRIYA/MALTA). 1985 ICJ Rep. 13.
International Court of Justice, June 3, 1985.

Pursuant to a Special Agreement, the Socialist People's Libyan Arab Jamahiriya (Libya) and the Republic of Malta submitted a dispute to the International Court of Justice concerning the delimitation of the continental shelf underlying the Mediterranean Sea between the two states. The Court held: that, in general, the location of a line of delimitation should take into account the distance between the two coasts and the disparity in the lengths of the relevant sections of those coasts, and that, here, an equitable result could be obtained by adjusting toward Malta a line equidistant between the two states, thus taking into account Libya's greater coastal exposure and Malta's relatively small size.

Malta comprises a group of inhabited islands and an uninhabited rock that together lie approximately 183 nautical miles (about 340 kilometers) north of Libya and about 43 nautical miles (80 kilometers) south of Sicily in the central Mediterranean. Malta claimed that a line of delimitation should be drawn at an equal distance between the states. Libya argued that a "rift zone," or deep canyon, in the seabed lying closer to Malta created the natural boundary between two separate continental shelves and thus served as an appropriate dividing line.

At the outset, the Court recognized that its jurisdiction was limited by the terms of the Special Agreement,¹ and it further limited the scope of its decision to avoid conflicting with competing claims of Italy, not a party to the dispute.² The Court found that the applicable law governing the case

¹ The Agreement provided that the Court would decide what principles of law would be applicable to the dispute and how such principles must be applied. The task of drawing the actual line was to be left to the parties in subsequent negotiations. Special Agreement for the Submission to the International Court of Justice of a Continental Shelf Dispute, May 23, 1976, reprinted in 21 ILM 971, 972 (1982); see also 1985 ICJ REP. 13, 16.

² Italy's application to intervene in the instant dispute was denied by the Court. See 1984 ICJ REP. 3, 25 (Judgment of Mar. 21). The Court's self-imposed restriction thus limited the area under consideration to a band of the sea running between the meridians 34°20' E on the west and 15°10' E on the east. The Court's denial of Italy's application continued the precedent of the Court's previous denial of Malta's application to intervene in similar proceedings between Libya and Tunisia. See Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, 1981 ICJ REP. 3 (Judgment of Apr. 14); Licari, *Intervention under Article 62 of the Statute of the I.C.J.*, 8 BROOKLYN J. INT'L L. 267, 274-87 (1982); Chinkin, *Third-Party Intervention before the International Court of Justice*, *supra* at p. 495.

was customary international law,³ which required that the delimitation be effected in accordance with equitable principles, taking into consideration all relevant circumstances.⁴

In applying such principles, the Court rejected Libya's contention that the natural prolongation of the land under the sea—including the physical properties of that land—was the primary basis of title to the continental shelf. The Court acknowledged that geological features might be relevant for ascribing title to two separate continental shelves that border states separated by more than 400 miles. Geological data are not relevant, however, in determining title to seabeds within 200 nautical miles of a state's coast.⁵

Instead, the Court adopted Malta's argument that the concept of the exclusive economic zone as embodied in customary international law required that natural prolongation be defined in part by distance from the shore, irrespective of the physical nature of the intervening seabed.⁶ Accordingly, it began the process of delimitation by tracing a provisional median line between the two coasts. It next adjusted the median line, out of equitable considerations, by eliminating from the baseline formed by the Maltese coast that portion that extended to Malta's uninhabited rock.

Finally, the Court adjusted the line northward toward Malta to account for (1) the fact that Malta is only a minor feature of the central Mediterranean, and (2) the marked disparity between the respective lengths of the Libyan and Maltese coastlines. It did this by first determining that the line could be no closer to Malta than could a similar line delimiting the continental shelf rights between Libya and Italy.⁷ The Court ruled that the final line must fall between the median line between Libya and Malta—at about latitude 34°12' north—and the median line between Libya and Sicily—at about

³ This finding flowed from the fact that there were no relevant treaties claimed to be binding on the parties. The Court accorded major importance to the 1982 United Nations Convention on the Law of the Sea (*opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5)), because, even though the Convention had not yet entered into force, both parties had signed it and it had been signed by an overwhelming majority of states. The Court noted, however, that while the Convention set a goal that the delimitation of disputed areas of a continental shelf is to be decided on an equitable basis, the Convention is silent as to the method to be followed to achieve this goal.

⁴ 1985 ICJ REP. at 31.

⁵ *Id.* at 35. The Court also rejected Libya's argument that the rift zone in the seabed nearer to Malta than to Libya marked a tectonic plate boundary between the two states, which thus constituted a physical discontinuity so fundamental between the two states that it should serve as a legal discontinuity as well. The Court observed that the data available to prove or disprove the hypothesis advanced by Libya were insufficient to form a legal basis for title. *Id.* at 36. *See also* Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18, 57 (Judgment of Feb. 24).

⁶ 1985 ICJ REP. at 37.

⁷ The Court reached this conclusion by first drawing an imaginary median line between Italy and Libya as if Malta did not exist. It then concluded that, since Malta does exist, the proper line of delimitation between it and Libya had to be somewhat south of the Italy-Libya median line. It reasoned that Malta, as an independent state, and not just a part of Italy, must have some rights to the continental shelf over and above those that Italy could assert. *Id.* at 51-52.

latitude 34°36' north—a range of approximately 24 minutes of latitude. Having satisfied itself that sufficient room existed between the two coasts—some 195 minutes of latitude—to permit some shifting of the median line without threatening the security of either state or moving away from the approximate middle, the Court held that adjusting the line three-quarters of the distance toward the northernmost limit—that is, to approximately 34°30' north latitude—would achieve an equitable result in all the circumstances.⁸

Three judges dissented and filed separate opinions. All three argued that the Court should not have limited the scope of its decision by the claims of Italy.⁹ In addition, Judge Mosler argued that the Court should have defined with some particularity which areas of the central Mediterranean were subject to delimitation between the parties. Judge Mosler also advocated adhering to a line equidistant between the two states. He stated that any disparity between the respective lengths of coastlines of the states would be reflected in the disparity of seabed area bounded by a median line. Finally, he rejected the argument that the Court's northern transposition of the median line could be justified by the fact of Malta's geographic location in the Mediterranean.¹⁰

Judge Oda disagreed with the Court's attempt to apply principles of proportionality without defining the relevant areas and coastlines that were to be compared. He advocated the application of an "equidistance/special circumstances" rule by which the general rule for delimitations would be an equidistance line between opposing states. Such a median line would only be modified by demonstrable special circumstances. One such circumstance could be the concept of a "half effect" of an island, as discussed in the 1977 arbitration decision involving a dispute between France and the United Kingdom over the delimitation of the seabed beneath the English Channel.¹¹ There, partial effect for drawing the equidistance line was allowed for a tiny part of one party's territory—an English island—that lay in the Channel. Judge Oda argued that, here, this same "partial effect" was improperly given to an entire sovereign party—Malta—as if it were just a tiny part of some larger whole.¹²

Judge Oda said that the "equidistance/special circumstances" rule had been accepted by the 1958 Geneva Convention on the Continental Shelf,¹³ the 1977 *Anglo-French* arbitration, and in the proceedings leading to the adoption of the 1982 Convention on the Law of the Sea. The fact of this

⁸ *Id.* at 52. The Court gave no reason why the line was moved three-quarters of the way north, as opposed to a different fraction, other than to note that some fraction had to be chosen and that the task it had assumed could not be infallibly reduced to a formula. *Id.*

⁹ *See id.* at 117 (Mosler, J., dissenting); *id.* at 131 (Oda, J., dissenting); *id.* at 173 (Schwebel, J., dissenting).

¹⁰ *Id.* at 114–22 (Mosler, J., dissenting).

¹¹ Case Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, 18 R. Int'l Arb. Awards 3, *reprinted in part in* 1985 ICJ REP. at 144–48 (Oda, J., dissenting).

¹² 1985 ICJ REP. at 139.

¹³ Apr. 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311.

acceptance was ignored or given little weight by the Court's subsequent decision in this case, as well as in the 1982 *Tunisia/Libya* continental shelf dispute and the 1984 Chamber of the Court's *Gulf of Maine* decision.¹⁴ Judge Oda advocated a line that he felt adhered to the "equidistance/special circumstances" rule; further, he considered as the only justifiable special circumstance the exclusion of Malta's uninhabited rock.¹⁵

In addition to his criticism of the Court's truncating the scope of its decision in deference to Italy's claims, Judge Schwebel found no justification for the Court's northward adjustment of the median line. He stated that the rationale alluded to by the Court was not supportable and did not contribute to the sense of consistency or predictability that he said should be the Court's goal.¹⁶

In this decision, the Court continues the development of a growing body of law concerned with each state's rights to the potential wealth of its adjacent continental shelf.¹⁷ It also demonstrates that the Convention on the Law of the Sea, while not yet in force, is nonetheless of major importance in international jurisprudence concerning the law of the sea.

Domestic sovereign immunity—statute of limitations—taking clause—American-Japanese Evacuation Claims Act

HOHRI v. UNITED STATES. 782 F.2d 227.

U.S. Court of Appeals, D.C. Cir., January 21, 1986.

Plaintiffs, 19 former Japanese-American internees and descendants of internees, brought this civil action against the United States seeking declaratory relief and compensation for injuries sustained when the internees were forced to evacuate their homes and relocate to internment camps during the Second World War. Plaintiffs alleged a variety of constitutional violations, torts, and breach of contract and fiduciary duty. The district court dismissed the complaint, finding that the applicable statutes of limitation barred the action. The U.S. Court of Appeals for the District of Columbia Circuit (per

¹⁴ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12). In *Gulf of Maine*, the Chamber roughly defined the disputed area—the seabed of the Gulf of Maine between the northeastern coast of the United States and the coast of Nova Scotia—as an open rectangle lying northeast to southwest, with the northwest corner approximately coinciding with the international boundary between the two countries and with one of the long sides opening out to the Atlantic Ocean. The Chamber fashioned a line of delimitation in three segments. The first segment emanated from a point near the northwest corner of the rectangle and proceeded out into the Gulf, bisecting the angle of that corner. The second and third segments proceeded out of the Gulf into the Atlantic, perpendicular to the open face of the rectangle and slightly nearer to Nova Scotia to account for the disparity of lengths of coastlines of the two countries in the relevant areas. See *id.* at 335–38.

¹⁵ 1985 ICJ REP. at 169.

¹⁶ *Id.* at 186–87.

¹⁷ See, e.g., North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20); Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ REP. 246.

Wright, J.) affirmed in part and reversed in part, and *held*: that plaintiffs had stated a cause of action under the Takings Clause¹ and that the claim was not time-barred since the United States had fraudulently concealed the fact that no military necessity existed to justify the internment of Japanese-American citizens.

During World War II, thousands of Japanese-American citizens were excluded from designated "military areas" and relocated to internment camps, where most of them remained for the duration of the war. At that time, relying upon the Government's allegation that the exclusion was justified by military necessity, the Supreme Court held in *Hirabayashi v. United States* (320 U.S. 81 (1943)) and *Korematsu v. United States* (323 U.S. 214 (1944)) that the Government's action was constitutional. The Court adopted the position that it was required to defer to Congress and the military as the "war-making branches" in matters affecting national security.

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians (CWRIC) for the purpose of conducting an investigation into the internment program. The CWRIC report,² released in 1982, concluded that there was no basis for the military necessity justification, and that U.S. Government officials knew this at the time the internment program was implemented and when the *Hirabayashi* case was briefed and argued before the Supreme Court. This report formed the basis for plaintiffs' action.

In support of its motion to dismiss, the United States relied on sovereign immunity, the applicable statutes of limitations and the alleged exclusivity of the American-Japanese Evacuation Claims Act.³

With respect to the Government's claim of immunity, the court held that where a statute, contract, regulation or constitutional provision clearly establishes a right to compensation from the United States, the Tucker Act (28 U.S.C. §1346(a)(2) (1982)) waives sovereign immunity. Moreover, the

¹ U.S. CONST. amend. V. The "Takings Clause" of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

² The full title of the report is *Report of the Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied* (1982).

³ Additionally, the United States asserted that the court did not have jurisdiction to hear the appeal. The court acknowledged that the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the district court if original jurisdiction was based, as in this case, "in whole or in part" on claims under the Tucker Act. See 28 U.S.C. §1295(a)(2) (1982); 28 U.S.C. §1346(a)(2) (1982). However, an exception exists where original jurisdiction is based on the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b) (1982). The court of appeals held that although the district court had dismissed the plaintiffs' FTCA claims, plaintiffs' action nonetheless was based in part on those claims and therefore it fell within the exception permitting the D.C. Circuit court to entertain the appeal. Chief Justice Markey, dissenting, maintained that Congress intended the exception clause to apply "only to cases brought in whole under one of the excepted subsections." 782 F.2d 227, 257 (Markey, C.J., dissenting). Because the appellate court affirmed the lower court's dismissal of plaintiffs' FTCA claims but remanded the case, it noted that subsequent appeals could be brought only in the Federal Circuit court. *Id.* at 241 n.31.

court noted, it is well settled that claims under the Takings Clause fall within this waiver.⁴

As to whether the action was time-barred, the court observed that the statute of limitations governing the contract and Takings Clause claims provided that a claim must be filed within 6 years from the time the cause of action accrued (*see* 28 U.S.C. §2401(a) (1982)). However, relying upon a line of cases following *Fitzgerald v. Seamans*,⁵ the court held that fraudulent concealment of material facts relating to the defendant's alleged wrongdoing will toll the statute of limitations, and that the fraudulent concealment doctrine applied equally in cases involving claims against the United States. To invoke this doctrine, plaintiffs had to show that concealment had occurred and that the facts concealed went "to a critical element or defense attending each particular cause of action."⁶

In applying this standard, the court reviewed the historical record and found that the Justice Department had concealed a lack of military necessity when it prepared its brief in the *Hirabayashi* case. A government report, prepared by Lt. Commander Ringle of the Office of Naval Intelligence, indicated that "cultural characteristics of the Japanese-Americans had *not* resulted in a high risk of disloyalty by members of that group . . . [and] individualized determinations [of loyalty] *could* be made expeditiously."⁷ Moreover, the court found that the Justice Department was aware of the Ringle report but did not disclose it;⁸ and that there were no intelligence data to counter the report or provide support for the Government's "military necessity" justification.

The district court had concluded that the Justice Department had concealed the Ringle report; however, the lower court had reasoned that since the report was available to the public in 1949, the period of repose had expired prior to 1983 when the plaintiffs filed their complaint. The appellate court disagreed.

The court of appeals characterized the Government's concealment as twofold—not only was the Ringle report withheld from the Supreme Court, but the lack of any data supporting the Government's claim of military necessity was not disclosed to the Court in *Hirabayashi* and *Korematsu*. Taken together, these two acts of concealment went "to the very basis of [plaintiffs'] Takings Clause claim";⁹ therefore, they were sufficient to toll the statute of limitations.

According to the court, in order to rebut the extraordinary presumption of deference adopted by the Supreme Court in *Hirabayashi* and *Korematsu*, the concealed evidence would have to rise to the level of "an authoritative

⁴ 782 F.2d at 242 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S.Ct. 2862, 2880 (1984)).

⁵ 553 F.2d 220 (D.C. Cir. 1977).

⁶ 782 F.2d at 250.

⁷ *Id.* at 234.

⁸ Edward Ennis, Director of the Alien Enemy Control Unit at the Justice Department, read the Ringle report at the time it was issued and informed the Solicitor General by memorandum of its contents. He recommended advising the Supreme Court of the report, stating that "any other course of conduct might approximate the suppression of evidence." *Id.*

⁹ *Id.* at 252.

statement by one of the political branches" that the military necessity justification was unsound.¹⁰ The court concluded that the Act of Congress establishing the CWRIC constituted the first such statement. The court reasoned:

At a minimum, the Act can be understood to be a formal statement that Congress no longer believed that the explanation provided by the military authorities for the internment program was adequate and that the issue should be reopened. Moreover, Congress took this step fully cognizant of previous congressional and Supreme Court approval of the legality of [the] internment program. . . . In so doing Congress finally removed the presumption of deference to the judgment of the political branches.¹¹

The Act thus served to rebut the presumption of deference, and only with its enactment in 1980 did the statute of limitations begin to run against plaintiffs' Takings Clause claims.

Finally, the court addressed the defense that the Japanese-American Evacuation Claims Act (50 U.S.C. app. §§1981 *et seq.* (1982)) provides the exclusive remedy for claims arising out of the internment program. The court found no evidence that Congress intended to preclude Takings Clause claims when it passed this statute. However, those claimants who had in fact received an award under the Act were foreclosed from later bringing an action under the Takings Clause.¹²

In its decision in *Hohri*, the court of appeals adopted an expansive view of the doctrine of fraudulent concealment. By finding that the statute of limitations was tolled until one of the political branches had made an authoritative statement undermining the presumption of deference first articulated in *Hirabayashi* and reaffirmed in *Korematsu*, the court in effect tolled the statute well beyond the publication of the first evidence pertaining to the necessity of the Japanese-American internment program.

Subject matter jurisdiction—choice of law—transnational reach of national legislation

RANDALL v. ARABIAN AMERICAN OIL CO. 778 F.2d 1146.
U.S. Court of Appeals, 5th Cir., December 26, 1985.

Plaintiff, a U.S. citizen formerly employed as an engineer in Saudi Arabia, sued his former employer, the Arabian American Oil Co. (ARAMCO), a

¹⁰ *Id.* at 251. The court based this conclusion on an assessment of events occurring after *Korematsu* that indicated that Congress and the executive branch believed that the Supreme Court's decision precluded civil damage actions based upon the internment program. Referring to the legislative history of the Japanese-American Evacuation Claims Act, 50 U.S.C. app. §§1981 *et seq.* (1982), the court noted that the statute was enacted in response to a perceived moral obligation and not to redress a "legal wrong." 782 F.2d at 237-38. In a letter from the Secretary of the Interior to the Speaker of the House, the Secretary assumed that "[t]he only clear recourse which the evacuees now have [is] through the passage of private relief bills." *Id.* at 238 (quoting H.R. REP. NO. 732, 80th Cong., 1st Sess. 3 (1947)).

¹¹ 782 F.2d at 253 (citation and footnote omitted).

¹² A petition for rehearing filed by the United States was denied on May 30, 1986.

Delaware corporation, for wrongful discharge. Plaintiff claimed, *inter alia*, that his discharge violated various provisions of the Labor and Workmen Law of Saudi Arabia (Labor Law). The U.S. District Court for the Southern District of Texas entered judgment for defendant, holding that jurisdiction over actions arising under the Saudi Labor Law was exclusive to the Saudi Arabian Labor and Settlement of Disputes Commission (Labor Commission). The U.S. Court of Appeals for the Fifth Circuit (per Garza, J.) reversed and *held*: that a U.S. court may resolve disputes between United States citizens arising under the Saudi Labor Law notwithstanding language in that law granting exclusive jurisdiction to the Saudi Labor Commission.

From May 1974 until August 1981, plaintiff was employed by defendant as a maintenance engineer in Dharan, Saudi Arabia. In August 1981, defendant discharged plaintiff for purportedly diverting company goods and services to plaintiff's own use and benefit. Plaintiff investigated the possibility of challenging his discharge before the Saudi Labor Commission; however, this allegedly led to threats of retaliation by defendant. Plaintiff thereupon returned to the United States and filed this diversity action against defendant in U.S. federal court.

As a preliminary matter, the court of appeals addressed the disputed issue of the district court's subject matter jurisdiction and held that such jurisdiction clearly existed by virtue of the diverse citizenship of the parties and the claim for damages in excess of \$10,000.¹ The court rejected outright "the notion that the law of a foreign country can unilaterally curtail the power of our federal courts to hear a dispute even though the dispute involves rights fixed by the laws of another nation."² The more difficult issue, however, was "whether in adopting Saudi law as the rule of decision (pursuant to Texas conflicts law) we must accept the exclusive jurisdiction provision [of the Saudi Labor Law] as part of the substantive law to be applied."³

The court determined that plaintiff's complaint alleged a "classic example of a transitory cause of action that may be enforced in any foreign court having subject matter and in personam jurisdiction."⁴ In this respect, the court relied upon a series of domestic employment cases involving application of the Full Faith and Credit Clause of the U.S. Constitution.⁵ The court then isolated two reasons in support of its ruling in the case.

First, the court observed that the Saudi exclusive jurisdiction provision could "fairly" be characterized as procedural in nature and not a part of the substantive Saudi Labor Law.⁶ Accordingly, the court was not bound by the exclusive jurisdiction provision, since traditional choice-of-law analysis

¹ The parties did not dispute that the court had in personam jurisdiction over the defendant.

² 778 F.2d 1146, 1150.

³ *Id.* at 1151. The parties did not dispute that Saudi Arabian substantive law provided the rule of decision in the case.

⁴ *Id.* (citation and footnote omitted).

⁵ U.S. CONST. art. IV, §1. *See, e.g.*, *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965); *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 360 (1914) ("[A] State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction").

⁶ 778 F.2d at 1152. In this respect, the court observed that it is left to the law of the forum to determine whether a law is substantive or procedural.

provides that a court is not required to apply the procedural aspects of a foreign law that otherwise governs the controversy.

Second, the court found "that the United States has an interest in providing a forum to its citizens especially when as here, Randall alleges that he was kept by ARAMCO from using the forum available to him in Saudi Arabia."⁷ The court acknowledged that Saudi Arabia had an interest in keeping its labor disputes within its country to avoid the danger of inconsistent interpretations of its domestic labor law. However, the court deemed paramount the U.S. interest in providing a forum to a U.S. citizen seeking to sue a U.S. corporation on an employment contract negotiated and made in the United States.⁸

The decision in *Randall* illustrates the flexible and result-oriented approach of many courts toward choice-of-law questions. While the Fifth Circuit concluded—without extensive analysis—that the exclusive jurisdiction provision of the Saudi Labor Law was merely "procedural" and thus not binding on the court, it appears that the court was primarily concerned with plaintiff's inability to sue in Saudi Arabia and the perceived interest of the United States in providing a forum for its aggrieved citizens. The decision affirms the central importance of such forum-state interests in choice-of-law analysis, particularly in cases where foreign remedies are considered inadequate or ineffective.

High seas—Marijuana on the High Seas Act—"customs waters" of the United States—"treaty or arrangement"

UNITED STATES V. GONZALEZ. 776 F.2d 931.

U.S. Court of Appeals, 11th Cir., November 1, 1985.

Six foreign nationals were charged with possessing, with intent to distribute, marijuana on board a vessel in the "customs waters" of the United States in violation of the Marijuana on the High Seas Act (21 U.S.C. §955a–955d (1982 & Supp. II 1984)) (the Act). On appeal of the district court's denial of the defendants' motion to dismiss the indictment, the U.S. Court of Appeals for the Eleventh Circuit (per Kravitch, J.) affirmed and *held*: (1) that under the Act no formal, preexisting treaty is necessary to enable the United States to extend its "customs waters" jurisdiction to reach foreign nationals on a foreign flag vessel outside U.S. territorial waters; and (2) that the Act is not impermissibly vague in violation of defendants' Fifth Amendment right to due process.

Defendants were crew members of a Honduran vessel intercepted by the U.S. Coast Guard 125 miles east of the Florida coast. On boarding and searching the vessel, the Coast Guard discovered 114 bales of marijuana. The Coast Guard then contacted the Honduran Government by telephone, which stated that it had "no objection" to the boarding, search, seizure and

⁷ *Id.* at 1153.

⁸ The court also rejected defendant's final argument that the act of state doctrine required recognition of the exclusive jurisdiction provision, noting that any concerns "regarding judicial interference with diplomatic relations are not at all implicated in this case." *Id.*

prosecution of the crew members. Defendants thereupon were arrested and transported to Miami to face trial.

Section 1(c) of the Act makes it unlawful "for any person on board any vessel within the customs waters of the United States . . . to possess with intent to manufacture or distribute, a controlled substance" (21 U.S.C. §955a(c) (1982)). "Customs waters" is defined as follows:

[I]n the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement. . . .¹

The United States and Honduras had no treaty authorizing U.S. officials to seize Honduran vessels on the high seas. The question for the court was whether the telephonic consent relayed by the Honduran Government to the Coast Guard personnel on board the vessel constituted an "arrangement" under the Act.

To answer this question, the court first examined the statutory sources of the term "customs waters." Congress based the definition of "customs waters" on the same term found in the Anti-Smuggling Act of 1935 (19 U.S.C. §§1701-1711 (1982)). In a recent decision, the court had found that Congress had used the term "arrangement" in the definition of "customs waters" in the context of the 1935 Act so as to allow for the ad hoc extension of U.S. customs waters to include "customs enforcement areas."² Under the 1935 Act, a "customs enforcement area" could be declared to exist for 100 miles around a vessel found "hovering" off the U.S. coast, regardless of its actual distance therefrom (19 U.S.C. §1701(a) (1982)). The court found that by using the same definition of "customs waters" in the Marijuana on the High Seas Act, Congress likewise intended to permit informal arrangements whereby "customs enforcement areas" could be created on the high seas in specific cases.

The court also found that requiring the prior execution of a formal written agreement between the United States and a foreign nation would defeat the purposes of the Act, which were to reach "all acts of illicit trafficking" and to encourage rapid enforcement actions against foreign vessels hovering off the U.S. coast.³ Using the same reasoning, the court dismissed defendants' alternative argument that even if the statute permitted informal "arrangements," such arrangements could be made only with foreign nations with which written treaties already existed.⁴

The court then turned to the defendants' assertion that because persons

¹ 19 U.S.C. §1401(j) (1982), incorporated by reference in section 2(a) of the Act, 21 U.S.C. §955b(a).

² See *United States v. Romero-Galve*, 757 F.2d 1147, 1153 (11th Cir. 1985).

³ 776 F.2d 931, 935-37 (quoting H.R. REP. NO. 323, 96th Cong., 1st Sess. 11 (1979)).

⁴ The court also noted that the Act did not violate the constitutional prohibition against ex post facto laws, or the Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82.

on board a foreign vessel on the high seas cannot know whether they are within a "customs enforcement area" to which U.S. jurisdiction extends, the Act is impermissibly vague in violation of the Due Process Clause of the Fifth Amendment. In response, the court noted that Congress grounded section 1(c) of the Act on the "protective principle" of international law, which allows a nation "to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions."⁵ The only restriction upon a nation's reliance on the protective principle is a rule of "reasonableness," according to which the distance from the nation's territorial waters and the purposes for which it seeks to exercise jurisdiction are measured.⁶ The court concluded that the reasonableness of the U.S. enforcement efforts in this case was demonstrated by the fact that the Honduran Government consented to the boarding and seizure.

The court also found that Congress properly relied on the protective principle in enacting section 1(c) because "it is often difficult to prove beyond a reasonable doubt that a vessel seized on the high seas carrying contraband was headed for the United States."⁷ The protective principle requires no proof of actual or intended effect within the enforcing nation, so long as the interdicted conduct "has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems."⁸ Defendants did not contend that the smuggling of narcotics failed to meet these criteria.

Although consent by a foreign nation is not necessary to permit the United States to assert extraterritorial jurisdiction under the protective principle, the court acknowledged that Congress intended to limit the potential for friction between the United States and other nations by providing a consent requirement in section 1(c) of the Act. The court emphasized, however, that the consent requirement was imposed as "a diplomatic requisite illustrating the international partnership that ensures the rule of law on the high seas";⁹ it was not to be construed as a necessary element of the offense. Nor did the informality of the type of consent permitted by the statute create a notice problem. Because the laws of all nations with reasonably developed legal systems prohibit the smuggling of narcotics, persons that engage in such activities do so with the full awareness of the risk that, if they are caught, their home nation will prosecute them or will consent to their prosecution elsewhere.

Judge Hatchett concurred specially in the decision, but stated that the term "arrangement" should not be interpreted so narrowly as to apply only to agreements authorizing the boarding of particular vessels in specific cases.

⁵ 776 F.2d at 938.

⁶ *Id.* at 939 (citing discussions of the protective principle in the Senate Report on the 1935 Anti-Smuggling Act, S. REP. NO. 1036, 74th Cong., 1st Sess. 5 (1935), and in *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 235 (1804)).

⁷ 776 F.2d at 939.

⁸ *Id.* (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §33 (1965)).

⁹ 776 F.2d at 940.

He did not believe that Congress intended to define U.S. "customs waters" according to the place where a particular vessel happened to be located, or that a successful telephone call to a foreign government after boarding a vessel was a necessary element in defining U.S. "customs waters." According to Judge Hatchett, the legislative history of the Act demonstrated that Congress had intended to grant the President flexible authority to designate, through informal agreements with foreign nations, broad geographic areas off the U.S. coast as U.S. "customs waters." Within those areas the Coast Guard would have the "unqualified" authority to board, search and seize foreign vessels. Thus, according to Judge Hatchett, the jurisdiction of the United States must be determined through advance agreements, rather than on a vessel-by-vessel basis.

The majority partially responded to Judge Hatchett's argument by noting that its holding (that an informal consent regarding a specific vessel constitutes an "arrangement" under the statute) "in no way address[ed] or preclude[d] either more formal or more sweeping executive agreements with foreign nations."¹⁰ Thus, the majority presumably would allow the assertion of U.S. jurisdiction on the basis of either informal consent or general agreements as suggested by Judge Hatchett. It failed to respond, however, to his argument that the statute intended to ground jurisdiction only on the latter and that federal jurisdiction cannot rise or fall on an ad hoc action as ephemeral as a telephone call.

Extradition—universal jurisdiction—"war crimes"—U.S.-Israel extradition treaty—"double criminality" requirement

DEMJANJUK v. PETROVSKY. 776 F.2d 571.

U.S. Court of Appeals, 6th Cir., October 31, 1985.

Appellant, John Demjanjuk, appealed the denial of a petition for a writ of habeas corpus which he had filed after a court had certified that he was subject to extradition to Israel. A native of the USSR, appellant was admitted to the United States in 1952 and became a naturalized U.S. citizen in 1958. In 1981, after finding that appellant had served as a guard at a Nazi concentration camp, a federal court revoked appellant's certificate of naturalization and vacated the order admitting him to U.S. citizenship.¹ Israel thereafter sought to extradite appellant in connection with charges arising from his World War II activities; and a U.S. district court certified that he was subject to extradition.² Since a direct appeal of this order was not available, appellant filed a petition for a writ of habeas corpus, which the district

¹⁰ *Id.* at 937 n.8.

¹ *United States v. Demjanjuk*, 518 F.Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982). The court found that the order and certificate were procured by "willful misrepresentation of material facts under 8 U.S.C. §1451(a)." 518 F.Supp. at 1386.

² *In re Extradition of Demjanjuk*, 612 F.Supp. 544 (N.D. Ohio 1985).

court denied.³ On appeal, appellant challenged the sufficiency of the evidence of his "war crimes," argued that he was not subject to extradition under the U.S.-Israel extradition treaty and asserted that the United States and Israel did not have jurisdiction over the alleged crimes. Rejecting these arguments, the U.S. Court of Appeals for the Sixth Circuit (per Lively, J.) affirmed the denial of the petition for a writ of habeas corpus and *held*: that appellant was properly subject to extradition to Israel.

The court observed that the "only evidentiary function of the extradition court is to determine whether there is sufficient evidence to justify holding a person for trial in another place."⁴ Appellant alleged that the U.S. Government had forged certain documents linking appellant to the Nazi concentration camps. However, the district court had specifically found that other evidence—the testimony of six eyewitnesses—was sufficient to support the extradition order apart from these documents. Accordingly, since the lower court had not relied on the documents, the issue of their validity was not before the appellate court. The court also found that, in any event, the record did not support appellant's charge of forgery by the U.S. Government.

The court next addressed appellant's contention that the alleged crimes were not extraditable offenses under the U.S.-Israel extradition treaty.⁵ Appellant asserted that "murdering thousands of Jews and non-Jews" was not covered by the treaty designation of "murder." The court acknowledged that "[i]t is a fundamental requirement for international extradition that the crime for which extradition is sought be one provided for by the treaty between the requesting and the requested nation."⁶ However, the court had no difficulty concluding that "murder" under the treaty included the mass murder of Jews, since this was a logical reading of the treaty and, moreover, was the interpretation of the U.S. State Department, an interpretation that was entitled to considerable deference.

Appellant also asserted that the district court had no jurisdiction since the "double criminality" requirement—whereby the alleged offense must be punishable as a serious crime in both the requesting and the requested states⁷—was not satisfied. In this respect, appellant alleged that he would be punished in Israel for killing Jews, while there is no separate, discrete crime for such acts in the United States. The court disposed of this contention as "absurd and offensive"⁸ since the act of unlawfully killing one or more persons with the requisite malice was clearly punishable as murder in both states.

Finally, appellant challenged the authority of Israel to proceed against him because he was not an Israeli citizen and because the alleged acts occurred

³ *Demjanjuk v. Petrovsky*, 612 F.Supp. 571 (N.D. Ohio 1985).

⁴ 776 F.2d 571, 576.

⁵ Convention relating to Extradition, U.S.-Israel, Dec. 10, 1962, 14 UST 1707, TIAS No. 5476.

⁶ 776 F.2d at 579.

⁷ See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §477(d) (Tent. Draft No. 7, 1986) [hereinafter cited as 1986 Draft Revised Restatement]; *Collins v. Loisel*, 259 U.S. 309 (1922).

⁸ 776 F.2d at 580.

in Poland in 1942 and 1943, before the State of Israel came into existence. The court acknowledged that under U.S. statutory law, the extradition complaint must charge the person sought with having committed crimes within the jurisdiction of the requesting state (*see* 18 U.S.C. §3184 (1982)). However, the court concluded that the statute at issue did not refer solely to territorial jurisdiction, but included also "universal jurisdiction," which is part of international law and therefore, also, the law of the United States. The "universality principle," the court observed, is "based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."⁹ Since the "prosecuting nation is acting for all nations,"¹⁰ the status of Israel in 1942 and 1943 was irrelevant, as were appellant's nationality and the situs of the alleged crimes. Indeed, the court concluded, "Israel or any other nation . . . may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes."¹¹

In passing, the court observed that a U.S. court is not empowered to order the extradition of any person. Rather, a court may certify that a person is properly subject to extradition, at which point the executive branch exercises its exclusive prerogative to determine whether to extradite.

After the court's decision in this case, the Supreme Court refused to grant certiorari,¹² and the U.S. Court of Appeals for the District of Columbia Circuit denied a request for a stay of execution of the extradition warrant.¹³ Appellant was thereupon extradited; and he is currently in custody in Israel awaiting trial.¹⁴

Sovereign immunity—Foreign Sovereign Immunities Act—commercial activities exception—expropriation exception—tortious activity exception

DE SANCHEZ V. BANCO CENTRAL DE NICARAGUA. 770 F.2d 1385.
U.S. Court of Appeals, 5th Cir., September 19, 1985.

Plaintiff, a Nicaraguan citizen and payee on a check issued by defendant, Banco Central de Nicaragua, brought an action against defendant after Nicaragua's new Government assumed power and stopped payment on the check. The U.S. District Court for the Eastern District of Louisiana held that the suit was barred by the act of state doctrine. The U.S. Court of

⁹ *Id.* at 582 (citing RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §404 (Tent. Draft No. 2, 1981) [hereinafter cited as 1981 Draft Revised Restatement]). The substance of §404 of the 1981 Draft Revised Restatement has not been changed in the most recent draft of the revised *Restatement*. Compare 1981 Draft Revised Restatement §404 with RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §404 (Tent. Final Draft, 1985) [hereinafter cited as 1985 Final Draft Revised Restatement]. The 1986 Draft Revised Restatement does not address §404. See also 1985 Final Draft Revised Restatement §423.

¹⁰ 776 F.2d at 583.

¹¹ *Id.*

¹² 106 S.Ct. 1198 (1986).

¹³ *Demjanjuk v. Meese*, 784 F.2d 1114 (D.C. Cir. 1986).

¹⁴ N.Y. Times, Mar. 1, 1986, at 3, col. 4.

Appeals for the Fifth Circuit (per Goldberg, J.) affirmed on other grounds and *held*: that the bank's issuance and stop payment of the check were sovereign acts and the bank was therefore immune from suit under the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA).

In September 1978, plaintiff purchased a 4-year certificate of deposit worth \$150,000 from Banco Nacional de Nicaragua, a then privately owned commercial Nicaraguan bank. In June 1979, when the Somoza Government was falling, plaintiff, the wife of a Nicaraguan general, left Nicaragua for the United States. At the time, Nicaragua was suffering from a critical shortage of foreign exchange. Despite strict exchange control regulations, President Somoza appealed to Banco Nacional to redeem the certificate on behalf of the plaintiff. Unable to meet this request owing to a shortage of dollars, Banco Nacional requested that defendant, the central government bank of Nicaragua, sell the dollars necessary to redeem the certificate. The defendant's president thereupon authorized the sale of the dollars and issued the plaintiff a check drawn on defendant's account with Citizens and Southern International Bank (C&S) in New Orleans.

By the time the check reached the plaintiff, the Somoza Government had been overthrown, and a group purporting to represent the Sandinista Government claimed control over defendant's account at C&S. In order to protect itself, C&S immediately froze defendant's account. The defendant's new president then contacted C&S directly and confirmed the stop payment order. Upon assuming power in Nicaragua, the new Government established priorities for the use of foreign exchange through regulations adopted by defendant. After conducting an audit of all checks on which payment had been stopped, defendant concluded that payment on the check issued to plaintiff would be inconsistent with national foreign exchange priorities. Defendant made this recommendation to the government junta then ruling Nicaragua, and the junta agreed.

After several unsuccessful attempts to cash the check, plaintiff brought suit against defendant alleging breach of duty to honor the check, misrepresentation, conversion and breach of contract. The district court determined that it had jurisdiction under the FSIA, but dismissed the suit on the basis of the act of state doctrine.

Plaintiff did not contest that defendant was an instrumentality of the Nicaraguan Government within the meaning of the FSIA. However, plaintiff alleged that three of the statutory exceptions to immunity applied in this case: (1) the commercial activity exception,¹ (2) the expropriation exception,²

¹ 28 U.S.C. §1605(a)(2). The commercial activity exception to the FSIA states that a foreign state is not immune from suit where

the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

² 28 U.S.C. §1605(a)(3). Under the expropriation exception to the FSIA, a state is not immune from any suit in which "rights in property taken in violation of international law are in issue."

and (3) the tortious activity exception.³ The court of appeals examined all of these exceptions and found none applicable.

With respect to the commercial activity exception, the appellate court defined the relevant activities of defendant as the issuance of the check and the failure of defendant to honor that check. The court then determined that these activities were sovereign rather than commercial in nature. With respect to the issuance of the check, the court found that under Nicaragua's foreign exchange regulations, defendant's actions in selling foreign exchange reserves were not the same as those of a private bank. By law, defendant was charged with the overall management of the country's monetary reserves and was permitted to sell foreign exchange only for certain limited purposes. Thus, unlike Banco Nacional, which sold the certificate of deposit to plaintiff in order to earn profits, defendant—which did not earn any fees by issuing the check—became involved with plaintiff “only in its official role of regulating the sale of foreign exchange.”⁴ Turning to defendant's second activity, i.e., its failure to honor the check, the court held that the “sovereign nature of [defendant's] issuance of the check imbued its later breach with sovereignty. Where a government enters into a contract in its sovereign capacity, then the breach of that contract partakes of the contract's initial sovereignty.”⁵ This conclusion, the court opined, is consistent with the policies underlying the commercial activity exception, since subjecting a state to suit on the basis of a contract involving intrinsically sovereign activities would touch on “national nerves.”⁶

The court also held inapplicable the expropriation exception to the FSIA. The court observed that it need not decide whether plaintiff's right to receive payment on the check was a “right in property” within the meaning of the Act in light of a more “basic reason” for denying relief: Nicaragua's breach of plaintiff's contractual rights did not violate international law, since it affected only a Nicaraguan national (the plaintiff), not an alien. In this regard, the court emphasized that international law deals only with relations between sovereign states, not between states and individuals. As long as a nation injures only its own nationals, then no other state's interest is involved. The court observed that this traditional dichotomy has begun to erode, specifically in the area of international human rights. However, unlike violations such as murder, torture and slavery, the “taking by a state of its national's property does not contravene the international law of minimum human rights.”⁷

Finally, the court rejected plaintiff's reliance on the tortious activity ex-

³ 28 U.S.C. §1605(a)(5). The “tortious activity” exception to the FSIA denies immunity to a state sued for tortious conduct that causes damage to property in the United States.

⁴ 770 F.2d 1385, 1393. The court acknowledged that in differentiating sales of dollars by defendant from sales by private banks, it relied on the *purpose* motivating the sales—as opposed to the *nature* of the activity as required by the FSIA. See 28 U.S.C. §1603(d). However, the court did not interpret §1603(d) as “bar[ring] us totally from considering the purposes of different types of activities.” Moreover, defendant's “purpose in selling dollars—namely, to regulate Nicaragua's foreign exchange reserves—was not ancillary to its conduct; instead, it defined the conduct's nature.” 770 F.2d at 1393.

⁵ 770 F.2d at 1394.

⁶ *Id.* at 1395.

⁷ *Id.* at 1397.

ception. Plaintiff's claim was for the conversion of property; however, the court considered this to be a mere rephrasing of plaintiff's claim for the unjust taking of property. Relying on judicial interpretations of the Federal Tort Claims Act (28 U.S.C. §§2674, 2680 (1982)),⁸ upon which the tortious activity exception was based, the court concluded that Congress did not intend to allow plaintiffs to rephrase takings claims as tort claims in order to permit the exercise of jurisdiction over activities of a foreign state that did not violate international law.

In this case, the court demonstrated a reluctance to examine the breach of a commercial contract by a foreign bank where the bank promulgated and administered government regulations concerning exchange controls. In this regard, the issuance of Banco Central's dollar check to plaintiff would appear to have constituted a commercial act at the time it occurred. The subsequent stop payment order, which was characterized by the court as a sovereign act, appears to have been allowed to influence the court's conclusion that the original issuance of the dollar check was a sovereign act. In any event, the result is to permit the defendant to use its sovereign power to defeat liability on a commercial obligation.

Countervailing duty law—rejection of generally available benefits rule

CABOT CORP. v. UNITED STATES. 620 F.Supp. 722.
U.S. Court of International Trade, October 4, 1985.

Plaintiff, a United States producer of carbon black,¹ sought review of a countervailing duty determination issued by the International Trade Administration, Department of Commerce, challenging the Department's finding that the Mexican Government's provision of carbon black feedstock and natural gas to Mexican carbon black producers at government-set prices did not constitute a countervailable subsidy. The Court of International Trade (per Carman, J.) reversed and remanded the Commerce Department's determination, and *held*: that the general availability of carbon black feedstock at government-set rates was not dispositive of the existence of a subsidy that warranted the imposition of a countervailing duty; however, the Commerce Department had to determine whether the government-set rates afforded Mexican carbon black producers a benefit or competitive advantage.²

Under a comprehensive economic development plan, the Mexican Gov-

⁸ In several cases brought against the United States, the courts have rejected attempts by the plaintiff to characterize taking claims as torts. *See, e.g.*, *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *Roman v. Velarde*, 428 F.2d 129, 132 n.5 (1st Cir. 1970).

¹ Carbon black is a substance used primarily in the rubber industry but also in the production of paints, inks, plastics and carbon paper. Carbon black feedstock and natural gas are essential raw materials for carbon black production. 620 F.Supp. 722, 727.

² The issue before the court regarding the provision of carbon black feedstock at government-set rates involved a domestic subsidy, rather than an export subsidy. Domestic subsidies are subsidies by foreign governments to domestic producers or manufacturers that are not tied explicitly to exports. *Compare* 19 U.S.C. §1677(5)(A) *with* 19 U.S.C. §1677(5)(B) (1982).

ernment, through its national petroleum company (PEMEX), provided carbon black feedstock and natural gas to the only two Mexican producers of carbon black at government-set prices. These prices were substantially below the "world market" price for carbon black feedstock. Plaintiff petitioned the Commerce Department to impose countervailing duties on carbon black imports from Mexico into the United States, arguing that the Mexican Government's supply of low-priced feedstock and natural gas was a countervailable bounty or grant under U.S. law.

In the course of its countervailing duty investigation under section 303 of the Tariff Act of 1930 (19 U.S.C. §1303 (1982)), the Commerce Department found that the preferentially priced carbon black feedstock and natural gas supplied by PEMEX were generally available to all industrial purchasers in Mexico. Therefore, applying the "generally available benefits rule,"³ the Commerce Department determined that the PEMEX program did not constitute a countervailable bounty or grant. Plaintiff sought review before the Court of International Trade, challenging the Commerce Department's application of the generally available benefits rule.

In examining the propriety of the Commerce Department's determination, the court first explored the relationship between two statutory provisions of U.S. countervailing duty law. Section 1677(5)(B) of title 19, which was added to the Tariff Act of 1930 by section 101 of the Trade Agreements Act of 1979, states that a countervailable "subsidy" has the same meaning as "bounty or grant" under section 303 of the Tariff Act of 1930. It then defines a countervailable domestic subsidy as one provided "to a specific enterprise or industry, or group of enterprises or industries" (19 U.S.C. §1677(5)(B)(1982)). The "generally available" exception to countervailable domestic subsidies arises from this language.

The court acknowledged that "subsidy" and "bounty or grant" were meant to be synonymous, but it also stated that Congress intended to leave the courts free to define the term on a case-by-case basis. Moreover, according to the court, section 1677(5)(B) "does not subsume 'bounty or grant'"⁴ and leaves intact the substantial body of judicial interpretation pertaining to that phrase which was handed down prior to the enactment of the Trade Agreements Act of 1979.

With this background in mind, the court rejected the Commerce Department's test because the test presumed that "all so-called generally available benefits are alike."⁵ The court stated:

³ The "generally available benefits rule," which evolved within the Commerce Department, was adopted by the Court of International Trade in *Carlisle Tire & Rubber Co. v. United States*, 564 F.Supp. 834 (Ct. Int'l Trade 1983). Under this rule, government-provided benefits or subsidies that are generally available to all companies or industries within that government's economy are not countervailable. Two other decisions of the court, however, have rejected the rule as contrary to the countervailing duty statutes. *Agrexco, Agricultural Export Co. v. United States*, 604 F.Supp. 1238 (Ct. Int'l Trade 1985); *Bethlehem Steel Corp. v. United States*, 590 F.Supp. 1237 (Ct. Int'l Trade 1984).

⁴ 620 F.Supp. at 730.

⁵ *Id.* at 731.

[S]ome are benefits accruing generally to all citizens, while others are benefits that when actually conferred accrue to specific individuals or classes. Thus, while it is true that a generalized benefit provided by government, such as national defense, education or infrastructure, is not a countervailable bounty or grant, a generally available benefit—one that may be obtained by any and all enterprises or industries—may nevertheless accrue to specific recipients. General benefits are not conferred upon any specific individuals or classes, while generally *available* benefits, when actually bestowed, may constitute specific grants conferred upon specific identifiable entities, which would be subject to countervailing duties.⁶

The court thus determined that “[t]he appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits.”⁷

The court then established a two-part test for determining whether a “bounty or grant” is countervailable in the case of domestic subsidies. First, whether or not it is generally available to domestic producers, “a benefit or ‘competitive advantage’ [must be] actually conferred on a ‘specific enterprise or industry, or group of enterprises or industries.’”⁸ Second, “the bestowal . . . [must amount] to an additional benefit or competitive advantage,” which might “fit within one of the illustrative examples of 19 U.S.C. §1677(5)(B),” although the list is not exhaustive.⁹ The Court of International Trade remanded the case for the Commerce Department to apply this test and further to investigate whether the Mexican pricing programs for carbon black feedstock and natural gas should be countervailed.

In this decision, the Court of International Trade redefines the legal standard for evaluating the countervailability of generally available benefits, requiring a case-by-case analysis of the “actual results or effects of assistance provided by foreign governments.”¹⁰ Under this standard, foreign governments will not easily avoid countervailing duties in the future by making benefits generally available to their producers. Moreover, the Commerce Department will presumably require more detailed facts from foreign governments concerning the actual benefits conferred by their economic development programs so that the agency can determine whether such programs in fact provide a competitive advantage.

⁶ *Id.* (emphasis in original).

⁷ *Id.* at 732.

⁸ *Id.* The court observed in passing that in connection with both domestic and export subsidies, “a bounty or grant is a benefit which gives rise to a ‘competitive advantage’.” *Id.* at 729.

⁹ *Id.* at 732. The court rejected plaintiff’s argument that “a price below the world market price is a per se countervailable benefit,” finding that “[t]he availability of inputs at low prices to foreign producers may be the result of various non-countervailable factors such as comparative advantage.” *Id.* at 733 n.9. For example, the close relationship between the carbon black producers and the Mexican government entity could permit the Government to sell oil byproducts that would otherwise go unsold. *Id.*

¹⁰ *Id.* at 730.

Pretrial discovery—foreign blocking statutes—foreign sovereign compulsion defense—good faith—sanctions for noncompliance with discovery order

REMINGTON PRODUCTS, INC. v. NORTH AMERICAN PHILIPS CORP. 107 F.R.D. 642.

U.S. District Court, D. Conn., August 22, 1985.

In a civil antitrust action, plaintiff Remington Products, Inc. moved for sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure against codefendant N.V. Philips Gloeilampenfabrieken, a Netherlands corporation, which had refused to provide discovery on the ground that such discovery was barred by a Dutch nondisclosure or "blocking" statute. The U.S. District Court for the District of Connecticut (per Zampano, J.) granted the motion, awarded sanctions in the amount of \$178,162.37 for reasonable costs and attorney's fees, and *held*: that defendant's refusal to provide discovery was made in bad faith and was not justified by the circumstances of the case.

In January 1982, Remington challenged in federal district court the acquisition of the "Schick" trademark by North American Philips Corp. (NAPC), claiming it was in violation of U.S. federal and state antitrust laws. NAPC's parent company, N.V. Philips Gloeilampenfabrieken (Philips), was named as codefendant. In the course of the litigation, Remington served certain discovery requests upon Philips. Philips refused to comply, arguing that certain portions of the requested discovery were irrelevant, that any relevant material was available from NAPC and that Philips was prevented from complying by Article 39 of the Dutch Economic Competition Act (the blocking statute).¹

In response, Remington filed a motion to compel discovery. The court ordered Philips to provide discovery and to seek a waiver under Article 39 from the competent Dutch authorities. Philips's application to the Dutch Ministry of Economic Affairs, however, was denied on the grounds that compliance with the discovery order (1) would require disclosure of information concerning conduct in and outside the United States of a company operating in the Netherlands, and (2) might conflict with principles of international law or Dutch competition law.² Subsequently, when Philips did not comply with the discovery order, Remington moved for sanctions under Rule 37 of the Federal Rules of Civil Procedure. In June 1984, a Special Master appointed by the court recommended that a default judgment be entered against Philips. In September, however, Philips submitted to the court a June 1984 interpretation by the Dutch Government of its blocking

¹ Article 39 states in relevant part: "Save in so far as Our Ministers have prescribed an exception or, on request, have granted exemption, it shall be forbidden to comply deliberately with any measures or decisions taken by any other State, which relate to any regulations of competition, dominant positions or conduct restricting competition." Dutch Economic Competition Act of June 28, 1956, 1956 Staatsblad voor het Koninkrijk der Nederlanden (Official Journal) 413, *as amended*, quoted in 107 F.R.D. 642, 647; also reprinted in A. LOWE, EXTRATERRITORIAL JURISDICTION 123 (1983).

² Letter from the Dutch Ministry of Economic Affairs to Philips, Aug. 2, 1983, quoted in 107 F.R.D. at 651 n.6.

statute indicating that Philips could comply with discovery requests of private parties but not with a court order for discovery.³ Without commenting on Philips's arguments, the court vacated its January 1983 discovery order; and by June 1985, Philips provided substantial discovery of material whose disclosure it had initially resisted.

Nonetheless, the court adopted the Special Master's findings and ordered Philips to pay Remington's expenses associated with litigating the discovery issue. The Special Master's report had found that the mere existence of a foreign statute prohibiting disclosure did not preclude the imposition of sanctions against Philips. Rather, the decision to impose sanctions depends on a balancing of interests, and the appropriate sanction must be determined by ascertaining both the prejudice to Remington and the culpability of Philips.⁴

Reviewing the factors enumerated in section 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965),⁵ the Special Master first found that the Dutch interest underlying Article 39 was not the confidentiality of business documents (which he considered to be adequately protected by a May 1982 protective order) but frustration with U.S. antitrust laws, which he did not consider a legitimate national interest.⁶ Second, since the

³ In March 1984, the Dutch airline KLM had applied for permission to comply with a pretrial discovery request in a civil antitrust action pending before the U.S. District Court for the District of Columbia. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 559 F.Supp. 1124 (D.D.C. 1983). This request was the source of the Dutch Government's interpretation.

It should be noted that administrative decisions other than those granting an exemption are only published in the form of anonymous abstracts in annual reports to the Dutch parliament; and also that governmental interpretations do not bind Dutch courts. For a detailed discussion, see Bronckers & Ter Kuile, *Blocking Legislation in the Netherlands*, 1 INT'L LITIGATION Q. 240, 244-49 (1985); Ham, *The Netherlands*, in B3 WORLD LAW OF COMPETITION, pt. 7, §6.03 (J. von Kalinowski ed. 1984).

⁴ The Special Master relied principally on *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958), and its progeny, as well as §40 of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter cited as RESTATEMENT].

⁵ Section 40 provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT, *supra* note 4, §40.

⁶ The Special Master cited RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §420 comment b (Tent. Draft No. 3, 1982), which requires that a judge

Dutch Government had never criminally prosecuted a Dutch national for violation of the blocking statute, and since a necessity defense might be available to Philips in any event, the Special Master discounted the possibility that Philips might be subject to criminal penalties for complying with the discovery order.⁷

The final question was whether Philips had acted in good faith when relying on the blocking statute. The Special Master found that the tenor of Philips's exemption application, while in compliance with the letter of the discovery order, fell "far short of [its] spirit."⁸ Furthermore, the Special Master reviewed *in camera* material Philips had voluntarily provided in another antitrust case without invoking the blocking statute,⁹ and found this information to be similar to the material requested by Remington. The Special Master therefore concluded that Philips did not act in good faith when it resisted Remington's discovery efforts.

The court, while agreeing with the Special Master that harsh sanctions would be justified, did not enter a default judgment but rather awarded Remington its costs and attorney's fees.

This case demonstrates that a party should exercise the utmost care in scrutinizing the scope of foreign nondisclosure laws before relying on them as a defense against U.S. discovery requests. Under the Dutch blocking statute as interpreted by the Dutch Government in the *Laker* case,¹⁰ the onus is on the private party to determine the extent to which it will comply with a private discovery request; however, the Dutch Government generally prohibits discovery compliance with foreign court orders or other requests from foreign governmental authorities. Thus, the private party faces a dilemma: The Dutch authorities are likely to ratify the party's noncompliance when the matter reaches the stage at which a foreign court order has been issued. However, at the stage in the proceedings when the party first receives the discovery request, it *could* legally comply; therefore, if it refuses to do so, it runs the danger of being held in bad faith by a U.S. court. The American Law Institute's proposal to subject all discovery of information located abroad to court supervision¹¹ would provide some relief, since it would require an

should take into account a foreign nation's policies and interests. This principle has been retained in the most recent version of the revised *Restatement*. See *RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* §437 comment c (Tent. Draft No. 7, 1986) [hereinafter cited as 1986 Draft Restatement].

⁷ As to the remaining three factors enumerated in the *Restatement*, the Special Master followed the analysis of the U.S. Court of Appeals for the Second Circuit in *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981), and found that certain discovery responses would occur in the United States, that Philips's transnational character made the nationality test less conclusive and that sanctions would be a reasonable means to achieve compliance.

⁸ 107 F.R.D. at 653.

⁹ See *General Business Sys. v. North Am. Philips Corp.*, 699 F.2d 965 (9th Cir. 1983).

¹⁰ See note 3 *supra*.

¹¹ See 1986 Draft Restatement, *supra* note 6, §437 comment a and Reporters' Note 2. Cf. *FED. R. CIV. P.* 16(c)(10)(e) (difficult legal questions to be discussed by the parties at pretrial conferences shall be resolved by pretrial orders).

early judicial pronouncement on the applicability of a foreign blocking statute and on whether production of documents should be ordered.

Another matter raised by the *Philips* case is the propriety of imposing sanctions, particularly an award of fees and costs, in the context of foreign discovery requests implicating a blocking statute. The Tentative Final Draft of the *Restatement of the Foreign Relations Law (Revised)* does not mention the award of expenses among the sanctions to be imposed on a foreign party for noncompliance with a discovery order. As a matter of U.S. procedural law, Rule 37 of the Federal Rules of Civil Procedure provides that a court shall award reasonable expenses unless noncompliance was "substantially justified" or "other circumstances make an award of expenses unjust."¹² If the scope of a foreign blocking statute is "an issue about which reasonable men could genuinely differ," opposition to a discovery request as such would not appear to be unjustified,¹³ and therefore an award of expenses may be inappropriate.

¹² FED. R. CIV. P. 37(b)(2).

¹³ See 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §2288, at 790 (1970).

CURRENT DEVELOPMENTS

THE GULF OF SIDRA INCIDENT

The clashes in the Gulf of Sidra (off the coast of Libya) between the navies of the United States and Libya in the last week of March 1986 have brought to the fore once again some legal problems surrounding the Libyan claims regarding the juridical status of the body of water in question.

The maritime area known as the Gulf of Sidra (also Sirte, Surt) covers about 22,000 square miles. As an arm of the Mediterranean Sea, it protrudes southwards to a distance of up to 140 miles, and is bordered on three sides (east, south and west) by the land territory of Libya. Under Article 1 of its Law of February 18, 1959, Libya fixed the limit of its territorial waters at 12 nautical miles.¹ That law superseded the law in force until then under which "the territorial sea of Libya extends six miles *from the coast*, as was the case before Libya's independence."²

Following the overthrow of King Idris I on September 1, 1969, carried out by a "Revolutionary Command Council" headed by Colonel Muammar el-Qaddafi, the new Government in 1973 made the following announcement:

The Gulf of Surt located within the territory of the Libyan Arab Republic and surrounded by land boundaries on its East, South and West sides, and extending North offshore to latitude 32 degrees and 30 minutes, constitutes an integral part of the Libyan Arab Republic and is under its complete sovereignty.

As the Gulf penetrates Libyan territory and forms a part thereof, it constitutes internal waters, beyond which the territorial waters of the Libyan Arab Republic start.

Through history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf. Because of the Gulf's geographical location commanding a view of the Southern part of the country, it is, therefore, crucial to the security of the Libyan Arab Republic. Consequently, complete surveillance over its area is necessary to insure the security and safety of the State.

In view of the aforementioned facts, the Libyan Arab Republic declares that the Gulf of Surt, defined within the borders stated above, is under its complete national sovereignty and jurisdiction in regard to legislative, judicial, administrative and other aspects related to ships and persons that may be present within its limits.

¹ See English translation of the article (prepared by UN Secretariat) in NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA 14, UN Doc. ST/LEG/SER.B/16 (1974).

² Note from Libyan Ministry for Foreign Affairs, dated Nov. 29, 1955, received by UN Secretariat, LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA 32, UN Doc. ST/LEG/SER.B/6 (1957) (emphasis added).

Private and public foreign ships are not allowed to enter the Gulf without prior permission from the authorities of the Libyan Arab Republic and in accordance with the regulations established in this regard.

The Libyan Arab Republic reserves the sovereign rights over the Gulf for its nationals. In general, the Libyan Arab Republic exercises complete rights of sovereignty over the Gulf of Surt as it does over any part of the territory of the State.³

This Libyan claim had also been contained in a Note sent by the Embassy of Libya to the United States Department of State on October 11, 1973, prompting a sharp protest and rejection by the latter. After characterizing the Libyan claim as "unacceptable as a violation of international law," the United States reply of February 11, 1974 stated:

The Libyan action purports to extend the boundary of Libyan waters in the Gulf of Sirte northward to a line approximately 300 miles long . . . and to require prior permission for foreign vessels to enter that area. Under international law, as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the body of water enclosed by this line cannot be regarded as the juridical internal or territorial waters of the Libyan Arab Republic. Nor does the Gulf of Sirte meet the international law standards of past open, notorious . . . effective . . . [and] continuous exercise of authority, and acquiescence of foreign nations necessary to be regarded historically as Libyan internal or territorial waters. The United States Government views the Libyan action as an attempt to appropriate a large area of the high seas by unilateral action, thereby encroaching upon the long-established principle of the freedom of the seas. . . .

In accordance with the positions stated above, the United States Government reserves its rights and the rights of its nationals in the area of the Gulf of Sirte affected by the action of the Government of Libya.⁴

It is evident from the wording of the Libyan announcement that Libya considers the line claimed as the northern limit of its internal waters (here-

³ The text of the Libyan announcement was provided to the UN Secretariat by the Permanent Mission of Libya to the United Nations in a Note Verbale of Oct. 19, 1973 and reproduced in: NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA 26-27, UN Doc. ST/LEG/SER.B/18 (1976).

⁴ Contemporary Practice of the United States, 68 AJIL 510-11 (1974); 1974 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 293-94.

The United States has also protested subsequent Libyan regulations aimed at implementing the Libyan proclamation of 1973. Referring to the Libyan navigational regulations, effective June 1, 1985, the Permanent Representative of the United States to the United Nations, in a communication dated July 10, 1985 and addressed to the Secretary-General, stated, *inter alia*:

Regulation 10 of the . . . [Libyan] notice to mariners requires that vessels strictly comply with directives pertaining to the so-called prohibited zones. . . . Zone C, as specified in regulation 10, lies within the Gulf of Sidra. . . . The United States reiterates its rejection of the Libyan claim that the Gulf of Sidra constitutes internal waters . . . and, accordingly, the United States rejects as an unlawful interference with the freedoms of navigation and overflight and related high seas freedoms, the Libyan claim to prohibit navigation in Zone C or elsewhere in the Gulf of Sidra.

inafter referred to as "the Libyan line") as the *closing line of the Gulf of Sidra* rather than as a *straight baseline* joining appropriate points of the coast.

Under the general rules of customary international law, as affirmed by the International Court of Justice in the Anglo-Norwegian *Fisheries* case⁵ and codified in the 1958 Convention on the Territorial Sea and the Contiguous Zone, as well as in the 1982 Convention on the Law of the Sea, the straight baselines method of delimitation may be resorted to in "localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity";⁶ however, "the drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."⁷

It is obvious that the Libyan line was drawn in a locality where the coastline is anything but "deeply indented or cut into"; likewise, there is no "fringe of islands along the coast or in its immediate vicinity" that could have warranted the drawing of the Libyan line, which, in any event, extends up to 140 miles from the coast. Moreover, the Libyan line *does* depart to a very appreciable extent from the general direction of the coast. One is thus inevitably led to the conclusion that the straight baselines method per se is clearly inapplicable in the instant case; in fact, as already indicated, Libya does not seem to have relied upon this notion in its 1973 announcement or since.

Instead, the Libyan announcement appears to be based on the claim that the Gulf of Sidra constitutes a Libyan "historic bay."⁸ For the purpose of examining the validity, under international law, of the Libyan claim, we may thus leave aside the question whether the Gulf of Sidra qualifies as a bay proper in the first place.⁹ Since both Article 7(6) of the 1958 Territorial

⁵ Fisheries case (UK v. Nor.), 1951 ICJ REP. 116 (Judgment of Dec. 18).

⁶ Art. 4(1), Territorial Sea Convention, Apr. 29, 1958, 15 UST 1606, TIAS No. 5639, 516 UNTS 205; Art. 7(1), 1982 UN Law of the Sea Convention, *opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UN Pub. Sales No. E.83.V.5).

⁷ Art. 4(2) of the 1958 Territorial Sea Convention; Art. 7(3) of the 1982 UN Convention. This provision closely follows the dictum of the ICJ in the Anglo-Norwegian *Fisheries* case where the Court ruled that "the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast." 1951 ICJ REP. at 133. The Court also referred to "the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the water off its coasts." *Id.*

⁸ On the concept of "historic bays" in general, see M. STROHL, THE INTERNATIONAL LAW OF BAYS 251-331 (1963); L. BOUCHEZ, THE REGIME OF BAYS IN INTERNATIONAL LAW 199-239 (1964); Y. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 241-81 (1965). Of the most recent studies on this topic, see Goldie, *Historic Bays in International Law—An Impressionistic Overview*, 11 SYRACUSE J. INT'L L. & COM. 211 (1984).

⁹ Under Articles 7(2) of the 1958 Territorial Sea Convention and 10(2) of the 1982 UN Convention, a "bay," for the purposes of those articles, must be a "well-marked indentation" that constitutes "more than a mere curvature of the coast" and whose area is "as large, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation." If one were to apply the semicircular area rule to the Gulf of Sidra, it would

Sea Convention and Article 10(6) of the 1982 Law of the Sea Convention stipulate that the "foregoing provisions [of those articles] do not apply to so-called 'historic' bays,"¹⁰ it may reasonably be argued that a "historic bay" does not necessarily have to fit the semicircular area criterion laid down for a "bay" in these Conventions.¹¹

Under existing law, a coastal state is entitled to enclose as internal waters a bay whose natural entrance does not exceed 24 miles, which is twice the current width of the territorial sea.¹² Where the natural entrance of the bay exceeds that width, a straight baseline of 24 miles may be drawn within the bay so as to enclose the maximum area of water that is possible within a line of that length.¹³ The Libyan line exceeds in its length the maximum permissible closing lines of bays by more than 12 times. It could be justified in international law only if Libya were able to demonstrate that the Gulf of Sidra had been claimed as a historic bay over an extended period of time; that the coastal state had effectively exercised its jurisdiction in the Gulf in the appropriate manner; and that the coastal state's claim and exercise of jurisdiction had been recognized by the international community of maritime states, or, at the very least, acquiesced in by that community.

Claims to historic waters in general (and to historic bays in particular) are relics of an older and by now largely obsolete legal regime. It will thus be readily understood that, while the international community may still be willing to consider, in exceptional circumstances, the validity of already *existing* claims of this kind, it has firmly rejected any attempts to establish any *new* maritime claims of an extravagant character. This approach is dictated by the realization that any such claims—if successful—clearly encroach on what otherwise would be considered the common domain of the international community. In other words, they would deprive the international community of certain portions of the high seas. It is on the basis of this consideration that Article 2 of the 1958 Convention on the High Seas categorically states that the "high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty."¹⁴

apparently not qualify as a "bay," since the length of the closing line (the diameter of the circle) is about 300 miles, and the area of the required semicircle thus roughly 35,000 square miles. The water area enclosed by the Libyan line, however, is only about 22,000 square miles.

¹⁰ Article 7(6) of the 1958 Territorial Sea Convention states that those provisions "*shall not apply,*" etc.

¹¹ See also to this effect M. STROHL, *supra* note 8, at 252, where he states that "it can probably be demonstrated that the universal application of . . . [the] rule [regarding the maximum closing line of 24 miles], as well as that of the semi-circular area rule, might be repugnant to the interests of the littoral State in the case of a particular bay, without significantly benefiting the whole aggregate of States." See also the UN Secretariat study *Juridical Regime of Historic Waters, including Historic Bays*, UN Doc. A/CN.4/143 (1962), *reprinted in* [1962] 2 Y.B. INT'L L. COMM'N at 1, 2, UN Doc. A/CN.4/SER.A/1962/Add.1.

¹² Art. 7(4) of the 1958 Territorial Sea Convention; Art. 10(4) of the 1982 UN Convention.

¹³ Art. 7(5) of the 1958 Territorial Sea Convention; Art. 10(5) of the 1982 UN Convention.

¹⁴ Apr. 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82. In the 1982 Convention, Article 87(1) provides that "the high seas are open to all States," while Article 89 states that "no State may validly purport to subject any part of the high seas to its sovereignty."

While the Libyan announcement of 1973 blandly states that "through history and without dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf [of Sidra]," Libya does not appear to have offered any evidence to substantiate this claim. Quite the contrary: the 1955 Note of the Libyan Ministry for Foreign Affairs referred to above makes it abundantly clear that prior to 1973, Libya claimed a territorial sea measured "from the coast, as was the case before Libya's independence."¹⁵ It unambiguously emerges from this statement that the measurement of Libya's territorial sea from its coast—rather than from the Libyan line or, for that matter, from any other line—had been the practice inherited by Libya upon its accession of independence in 1951. It is thus hardly surprising that in the literature of the international law of the sea, no trace of evidence seems to exist of a "historic" claim to the waters of the Gulf of Sidra during the preindependence period.¹⁶ Equally revealing in this regard is the fact that no mention is made of the Gulf of Sidra in the survey of historic bays (or bays claimed as such) contained in the Memorandum on Historic Bays prepared by the UN Secretariat for the first UN Conference on the Law of the Sea.¹⁷

It is obvious that—contrary to the assertions of the 1973 Libyan announcement—Libya did not claim the Gulf of Sidra as a historic bay *before* 1973.¹⁸ It thus becomes unnecessary to examine the Libyan allegation that the exercise of full Libyan jurisdiction over the Gulf—even on the unlikely assumption that it is physically possible to exercise such jurisdiction effectively—¹⁹ is in fact crucial to Libya's security.

¹⁵ See text at note 2 *supra*. The subsequent extension, in 1959, of Libya's territorial sea from 6 to 12 miles (see note 1 *supra* and accompanying text) does not affect the *method* of delimitation of the territorial sea, namely, the principle that the territorial sea is measured—and very properly so—from the coast, as stated explicitly in the 1955 Libyan Note.

¹⁶ This silence also has been remarked upon by Rousseau: "La doctrine récente ne range pas le golfe de la Grande Syrte . . . dans la catégorie des baies historiques soit reconnues par les Etats tiers, soit revendiquées par les Etats riverains. . . ." 78 REV. GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1177, 1178 (1974). Rousseau mentions in this connection particularly the silence of Strohl and Bouchez (both *supra* note 8), which he finds all the more remarkable in view of their extensive discussion of the status of the neighboring Gulf of Gabes.

¹⁷ 1 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, PREPARATORY DOCUMENTS 3-10, UN Doc. A/CONF.13/37 (1958). Admittedly, the bays mentioned in that survey "are cited for the purpose of illustration," *id.* at 3, and should not be considered as an exhaustive catalog. Nonetheless, it was pointed out in the Secretariat's 1962 study on "Historic Waters, including Historic Bays," *supra* note 11, at 5, that "it would be difficult to make useful additions" to that list.

In view of the 1973 Libyan announcement, note 3 *supra*, and the resulting incidents in the Gulf of Sidra (in particular, the incident of Aug. 19, 1981; see notes 21 and 22 *infra*), the present writer has included the Gulf of Sidra among the bays regarded as historic bays or claimed as such in the entry on "Historic Rights," published in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Instalment 7 at 120, 125 (R. Bernhardt ed. 1984).

¹⁸ The novel character of the Libyan claim seems to have been admitted implicitly even by the representative of Libya when he told the UN Security Council, on Mar. 27, 1986, that "[i]n 1973 Libya declared its historical and inalienable rights over the Gulf of Sidra." UN Doc. S/PV.2670, at 31 (1986).

¹⁹ As has been pointed out by Charles De Visscher, "the regime of historic bays . . . is one

It appears, moreover, that the Libyan announcement of 1973 was indeed "an attempt to appropriate a large area of the high seas," as stated in the United States reply of February 11, 1974.²⁰ Consequently, it can have no legal validity on the international plane; repeated attempts made since by Libya to prevent foreign vessels from crossing the Libyan line cannot be reconciled with the basic rules governing the freedom of the high seas. Thus, various instances of Libyan interference with U.S. vessels and aircraft beyond Libya's 12-mile territorial sea limit, as measured from the coast (e.g., the incident of August 19, 1981 took place 60 miles from the Libyan coast),²¹ were clearly incompatible with the international legal regime of the high seas, Libyan assertions to the contrary notwithstanding.²² The same conclusion applies, of course, to the incidents of March 1986.²³

application of effectivity by gradual consolidation of an objective situation. The historic bay is one in which sovereign rights have been *effectively* exercised by the riparian State . . . continuously and over a long period without opposition from . . . [other] States." THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 322 (rev. ed. trans. Corbett 1968) (emphasis added). See also C. DE VISSCHER, LES EFFECTIVITÉS DE DROIT INTERNATIONAL PUBLIC 50-51 (1967); Doebling, *Effectiveness*, in R. Bernhardt (ed.), *supra* note 17, at 70-74.

²⁰ See text at note 4 *supra*.

²¹ For a more detailed description of that incident and of its diplomatic repercussions, see 27 KESING'S CONTEMPORARY ARCHIVES 31,181-82 (1981). For the text of the U.S. protest transmitted to Libya on Aug. 19, 1981, and for the U.S. version of the incident as reported to the President of the United Nations Security Council, see UN Doc. S/14632 of that date. In the course of the incident, two Libyan aircraft were shot down by U.S. aircraft. It was revealed in 1981 that President Carter was understood in 1980 to have given a standing order to the U.S. Armed Forces not to cross the Libyan line, so as not to exacerbate the Iranian hostage crisis (KESING'S CONTEMPORARY ARCHIVES, *supra*, at 31,181), but

[t]he end of the hostages crisis and the arrival of President Reagan changed matters. And in August 1981 the administration decided to challenge Libya's claim to the Gulf. This decision . . . did not represent a radical change in US policy; it was only a shift from the temporarily passive position adopted by President Carter as a result of the inordinate importance which he had given to the hostages crisis.

K. BOOTH, LAW, FORCE AND DIPLOMACY AT SEA 175-76 (1985).

²² See letter dated Aug. 20, 1981 from the representative of Libya and addressed to the President of the Security Council, UN Doc. S/14636, enclosing a letter from the Libyan Foreign Minister. In that letter, the Foreign Minister refers to the U.S. military maneuvers as part of "the campaign of terror and provocation waged by the United States of America." While quoting the 1973 Libyan announcement to the effect that the Gulf of Sidra is claimed by Libya as "internal waters beyond which the territorial waters of the Libyan Arab Republic start," the Foreign Minister somewhat strangely and incongruously maintains in his letter that the U.S. naval exercises "have taken place in an area in the Gulf of . . . Sidra, within the territorial waters of the Libyan Arab Jamahiriya." *Id.* (emphasis added). The shooting down of the Libyan aircraft was described by the United States as an act of self-defense. UN Doc. S/14632 (1981). It was denounced by Libya as "international terrorism." UN Doc. S/14636 (1981). The Arab Group at the United Nations called it "aggression" and declared "its total solidarity with Libya." See Annex to letter dated Aug. 21, 1981 from the representative of Algeria [Chairman of the Arab Group] to the President of the Security Council, UN Doc. S/14638/Rev.1 (1981). It is not without significance that "in February 1983, when Libyan aircraft again approached the US carrier *Nimitz* in approximately the same area of the Gulf of Sirte as that in which the 1981 incident had taken place, they turned tail without a shot having to be fired." K. BOOTH, *supra* note 21, at 177 (citation omitted).

²³ For the U.S. position regarding those incidents, see the statement in the Security Council

Since under contemporary international law of the sea, any attempts by individual states to appropriate portions of the high seas are deemed invalid,²⁴ there appears to be no need, from the legal point of view, for other states to make a formal protest so as to prevent such rights from being established—as was required in respect of traditional “historic” claims. Thus, American (and other) protests against the Libyan claim to the Gulf of Sidra from 1974 onwards must be regarded as having been lodged *ex abundante cautela*.²⁵ In any event, even if one assumes that new “historic” claims over high seas areas can still be established (notwithstanding the relevant provisions of the 1958 High Seas Convention and the 1982 Law of the Sea Convention) and that opposition by other states is still necessary to prevent it, the consistent United States opposition to the Libyan claim from its very inception, coupled with the U.S. activities in the Gulf of Sidra, certainly renders the claim invalid as against the United States and not “opposable” to it.²⁶

In fact, it may not be “opposable” to other states either; as evidenced by the Security Council debate that took place between March 26 and 31, 1986,²⁷ no support was forthcoming for Libya’s claim to the Gulf of Sidra as internal waters, with the exception of Syria. The Syrian representative told the Council: “we do not for a moment doubt that the Gulf of Sidra is historically an Arab Gulf.”²⁸ By contrast, Sir John Thomson, on behalf of the United Kingdom, categorically rejected the Libyan claim, stating:

of Ambassador Vernon Walters, UN Doc. S/PV.2668, at 18–22 (1986). For the Libyan position, see UN Doc. S/PV.2670, at 27–35 (1986).

²⁴ Libya never became a party to the 1958 High Seas Convention; however, as was stated in the second preambular paragraph of that Convention, its provisions were adopted “as generally declaratory of established principles of international law,” and thus constituted a codification of international customary law relating to the high seas. See the first preambular paragraph of the Convention, *supra* note 14. As such, its provisions are also binding on those states that did not formally become parties to it. While Libya did sign the 1982 UN Law of the Sea Convention (it has not yet ratified it), the various questions arising in connection with the juridical status of the Gulf of Sidra have to be resolved on the basis of events antedating that Convention.

²⁵ See; however, Rousseau, *supra* note 16, at 1179, who considers the Gulf of Sidra as a historic bay, despite his admission that doctrine has consistently refrained from including the Gulf in this category. Rousseau seems to proceed on the assumption that the assertions made in the Libyan announcement regarding the longtime, effective and uncontested jurisdiction of Libya over the Gulf of Sidra do indeed correspond to historic realities. In the author’s view, these Libyan assertions are totally unsubstantiated and Rousseau has taken them at face value without subjecting them to any critical scrutiny. If anything, the silence of the doctrine—and all the more the 1955 Note of the Libyan Foreign Ministry, *supra* note 2—is the strongest possible evidence that Libya did *not* claim any sovereign rights within the Gulf of Sidra (beyond the 6- or 12-mile limit of the territorial sea) prior to 1973, at which time it was already too late to raise new “historic” claims at the expense of the international community.

²⁶ See Francioni, *The Status of the Gulf of Sirte in International Law*, 11 SYRACUSE J. INT’L L. & COM. 307, 311, 326 (1984). At the same time, Francioni takes the view that “at least on an intertemporal basis, [the] principle [of reciprocity] would involve an obligation to respect the Libyan claim by those states whose own domestic legislation and international practice has proceeded to the assertion of similarly exceptional claims over their respective coasts.” *Id.* at 325.

For the meaning and scope of the concept of “opposability” in general, see J. CHARPENTIER, *LA RECONNAISSANCE EN DROIT INTERNATIONAL ET L’ÉVOLUTION DU DROIT DES GENS* (1956).

²⁷ See UN Docs. S/PV.2668–2671 (1986). ²⁸ UN Doc. S/PV.2670, at 12 (1986).

It is well known that Libya has eccentric border policies which cause trouble to its neighbours. . . . In the Mediterranean Sea its neighbours are not just the countries which occupy the littoral on either side of it, but the whole international community. We all have a right to traverse international waters and no country has a right to arrogate these waters exclusively to itself.²⁹

The British representative then reminded the Council that

[t]he vast majority of countries have consistently refused to acknowledge [the Libyan claim] and many have indeed made specific protests. I refer, for example, to the protest made in September last year by the presidency of the European Communities on behalf of its member States . . . over the introduction of illegal restrictions in the Gulf of Sirte, or Sidra [rejecting] Libyan claims to sovereignty over the waters extending beyond the legitimate limits of the territorial sea.³⁰

The representative of France likewise told the Council: "France considers that Libya's claims to sovereignty over the Gulf of Sidra are without foundation in history and are unjustified under the 1958 and 1982 Conventions on the Law of the Sea. . . . [T]he Libyan authorities . . . were reminded of [France's position] by the French authorities at the appropriate time."³¹

Even the representative of Malta, who had been among the sponsors of the debate and had expressed his opposition to the U.S. naval activities in the Gulf of Sidra, reminded the Council that as far back as 1974, his Government had notified Libya as follows: "The Government of Malta cannot accept or recognize the contention that the Gulf of Sidra south of [the Libyan] line . . . is a part of Libyan territory or falls under Libyan sovereignty."³²

It is also revealing that many of the states that opposed the U.S. naval activities in the Gulf of Sidra evaded the questions relating to the juridical status of the Gulf and the Libyan claims over it. Characteristic of these states was the Soviet Union whose representative dodged repeated questions by the representatives of the United Kingdom (Messrs. Thomson and Maxey) about the Soviet position on freedom of navigation in the Gulf of Sidra.³³

Even more revealing is the obvious reluctance of Arab League participants in the debate to support the Libyan claim to the Gulf of Sidra. Thus, the representative of Kuwait, while denouncing the U.S. naval operations in the Gulf, stated: "The fact is that there exists a difference of opinion between two Members of the United Nations over an issue that should be regulated

²⁹ UN Doc. S/PV.2669, at 32 (1986).

³⁰ *Id.* at 33-35.

³¹ *Id.* at 38.

³² UN Doc. S/PV.2668, at 17 (1986).

³³ Thus, e.g., Mr. Maxey asked the Soviet representative:

[D]oes the Soviet Union subscribe or not to the principle of freedom of navigation on the high seas, and does the Soviet Union support, or does it not support the claim which Libya has proclaimed in relation to the Gulf of Sidra? . . . One cannot have it both ways. The Soviet [Union] . . . continue[s] to wish to have it both ways, and the reasons . . . are clear enough to all of us.

UN Doc. S/PV.2670, at 73 (1986). The Soviet representative in his reply stubbornly evaded this issue. *Id.* at 73-74.

by international law and arbitrated through customary norms."³⁴ In the same vein, the Permanent Observer of the League of Arab States to the United Nations (Clovis Maksoud) told the Council:

The United States contests Libya's claim that the Gulf of Sidra is within its territorial (*sic*) waters. The right to challenge Libya's claim is accepted but [not] the means by which it has been challenged. . . . [T]here are many, many peaceful means to test the validity of that claim. . . . [I]n many ways [the challenging of Libya's claim] is shared.³⁵

Even such "radical" stalwarts and traditional supporters of Libya as the representatives of Iran and Democratic Yemen refrained from lending their support to the Libyan claim regarding the Gulf of Sidra. The former circumvented the issue by referring to "some legalistic trivialities concerning the validity of the Libyan interpretation of its territorial waters"³⁶ and then went on to state: "*Whatever the significance of the Libyan interpretation may be, . . . [t]he sinister, provocative intentions of the United States should not be justified in terms of academic disagreements on the extent of Libya's territorial (*sic*) waters*" (emphasis added).³⁷ In the view of the representative of Democratic Yemen, "It is clear that the dispute over the Gulf of Sidra was only a pretext to undermine . . . Libya."³⁸

The United Kingdom representative (Mr. Maxey) thus correctly summed up the legal situation by stating: "practically no State has recognized [Libya's] claim, and many have specifically denied its validity."³⁹

The fundamental flaw in the Libyan argument seems to stem from Libya's apparent inability—or unwillingness—to recognize the following aspect of the international law of the sea of the post-World War II period, as codified in the 1958 and 1982 Conventions: while still prepared to entertain, under appropriate circumstances, certain exceptional claims to maritime areas (including bays), the current law of the sea has frozen the existing situation in regard to historic bays, with a view to preventing the emergence of new "historic" claims. At first sight, this approach may appear to operate unfairly to the advantage of the "old" (essentially European) states that over the years were able to establish such privileged claims in their favor. In contrast, according to this view, the "new" states of Asia, Africa and Latin America, owing to the relative brevity of their statehood, have been unable to build up such time-honored claims, unless they were formerly asserted on their behalf by the colonial power.

It must be remembered, however, that the concept of historic bays (and its subsequent extension to historic waters in general) was originally intended to provide for as smooth as possible a transfer from some vague and obsolete notions of the late Middle Ages to the more stringent requirements of the modern international law of the sea. The doctrine of historic bays, consti-

³⁴ UN Doc. S/PV.2669, at 12 (1986).

³⁵ UN Doc. S/PV.2670, at 51-52 (1986). In an obvious attempt to placate Libya, Mr. Maksoud then added: "But there is some logic to Libya's claim. It may not be universally accepted logic, but it exists." *Id.* at 53-55.

³⁶ *Id.* at 43.

³⁸ UN Doc. S/PV.2671, at 7 (1986).

³⁷ *Id.*

³⁹ UN Doc. S/PV.2670, at 72 (1986).

tuting as it does a departure from the general rules of the law of the sea, operates to the detriment of the interests of the international community as a whole. Consequently, it must be applied and interpreted in a restrictive manner.

Moreover, and even more importantly, the sanctioning by the contemporary law of the sea of the extension of territorial waters to 12 miles, together with the development of the regimes of the continental shelf and the exclusive economic zone, was largely intended to meet those needs of the coastal state (economic, security, etc.) that had traditionally justified "historic" claims—and in so doing, to compensate the "new" states for their lack of "historicity." At the same time, these legal developments were also intended to bring about a gradual phasing out and the eventual elimination of the phenomenon of "historic" claims *per se*, through their *de facto* incorporation into the general international law of the sea. The elimination of the right to assert such exceptional claims primarily serves the interests of the small and "new" states; the perpetuation of the right to establish new "historic" claims could, in the long run, only favor the interests of the stronger powers capable of asserting such claims at the expense of the common property of the international community. Moreover, the principle that new claims should be allowed that are based, in effect, on asserting and militarily maintaining adverse possession seems at variance with the admonition of the UN Charter against the unilateral use of force.

Libya's claims to the Gulf of Sidra cannot be accommodated within the general international law of the sea. Obviously, this was realized by the Libyans themselves in 1973 when they chose to rely on a "historic" claim to support their demand—incidentally, it would have looked rather extravagant even in the heyday of the "historic bay" doctrine.⁴⁰ A claim of this kind certainly cannot be entertained today because of its demonstrable deficiencies with regard to both the historical facts and the applicable law.

Writing in 1985 (i.e., before the March 1986 incidents in the Gulf of Sidra), one writer anticipated that

[n]aval strategists . . . will have to be watchful of the possibility . . . that particular states may take the law into their own hands. The determination of the United States to stop unacceptable developments is beyond doubt. . . . One sign of the times . . . was the incident in August 1981 between United States and Libyan aircraft in the Gulf of Sirte. . . . If the freedom of the seas as it is understood by the naval powers has to be bought by vigilance and violence, then it will be, and the US Navy will bear the brunt.⁴¹

The events of March 1986 seem to have fully borne out that prediction.

YEHUDA Z. BLUM*

⁴⁰ Suffice it to state here that even Canada's claim, on historic grounds, to Hudson Bay (with an entrance of 50 miles) has not gone unchallenged. See C. COLOMBOS, *INTERNATIONAL LAW OF THE SEA* 186 (6th ed. 1967); M. STROHL, *supra* note 8, at 233–50. In comparison, the closing line of the Gulf of Sidra claimed by Libya, as will be recalled, is 300 miles long.

⁴¹ K. BOOTH, *supra* note 21, at 89 (citations omitted).

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INVESTIGATING ALLEGATIONS OF CHEMICAL OR BIOLOGICAL WARFARE:
THE CANADIAN CONTRIBUTION

The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare¹ unequivocally makes the use of chemical and biological weapons an illegitimate means of waging war.² Yet enforcement of the Protocol is hindered by the lack of an investigative mechanism to provide prompt and effective verification of an alleged violation. In response to controversy³ stemming from this omission, in 1982 the General Assembly requested that the Secretary-General enlist the assistance of experts to investigate alleged breaches of the Protocol and relevant rules of customary international law, devise procedures for timely and efficient investigation, and document information relating to the identification of chemical and biological warfare agents.⁴ In 1984 the Secretary-General submitted his Report on Chemical and Bacteriological (Biological) Weapons to the General Assembly, which included the provisional procedures recommended by the Group of Consultant Experts.⁵ Deeply concerned about the use of such weapons,⁶ and

¹ June 17, 1925, 94 LNTS 65, 26 UST 571, TIAS No. 8061.

² The General Assembly has endorsed the 1925 Geneva Protocol on numerous occasions. See, e.g., GA Res. 40/92C (Dec. 12, 1985). Despite the prohibition, the use of chemical and biological weapons has been alleged or proven on several occasions. For instance, in 1983 Iran accused Iraq of using chemical weapons, and an independent investigating team dispatched by the Secretary-General found evidence that mustard and nerve gas had been used. UN Doc. S/16433 (1984). More recently, a team of experts concluded that Iraq had indeed used chemical weapons against Iran. UN Doc. S/17911 and Add.1 (1986). See also *infra* note 3.

³ Intense controversy between Western nations and the Soviet bloc arose after an impartial team of experts, appointed by the Secretary-General pursuant to General Assembly Resolution 35/144C of Dec. 12, 1980, investigated U.S. Government allegations that chemical weapons were used in Afghanistan and Southeast Asia. The experts found "circumstantial evidence suggestive of the possible use of some sort of toxic chemical substance in some instances." UN Doc. A/37/259, at 50 (1982). See T. FRANCK, NATION AGAINST NATION 248-51 (1985).

⁴ GA Res. 37/98D (Dec. 13, 1982). During committee deliberations, the Soviet Union and Argentina added an interesting twist to solving the verification problem by claiming that any verification regime would constitute amendment of the 1925 Geneva Protocol. They questioned the legality of amending an international instrument by a mere majority of states, including states that were not parties to the agreement. See UN Doc. A/C.1/37/PV.47, at 36, 46-50 (1982).

⁵ UN Doc. A/39/488, Ann. II (1984) [hereinafter the Report]. The General Assembly noted with satisfaction that with the submission of the Report, the implementation of Resolution 37/98D, *supra* note 4, was completed. GA Res. 39/65E (Dec. 12, 1984).

⁶ Canada has been concerned about the spread of chemical weapons since they were first used against Canadian troops during World War I. Telephone interview with Lt. Col. W. A. Morrison, Counsellor (Arms Control and Disarmament), Canadian Mission to the United Nations (Jan. 31, 1986). See STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE: VOL. 1, THE RISE OF CB WEAPONS 29-31 (1971). The Canadian Government made a presentation to the Group of Consultant Experts to assist in preparation of the Report, *supra* note 5, and submitted the names of scientific experts and laboratories to the Secretary-General pursuant to General Assembly Resolution 37/98D, *supra* note 4.

perceiving a need for more extensive guidance on the subject,⁷ the Canadian Government prepared the *Handbook for the Investigation of Allegations of the Use of Chemical or Biological Weapons* and presented it to the Secretary-General on December 4, 1985.⁸

The appearance of a detailed handbook is particularly opportune at this time. The General Assembly recently adopted, by consensus, a resolution recognizing the importance of the verification process in arms control and disarmament negotiations.⁹ The resolution requests member states to report their views on verification principles and procedures, and on the role of the United Nations in the process, to the Secretary-General. Furthermore, the Conference on Disarmament is negotiating a multilateral convention to prohibit the development, production and stockpiling of chemical weapons.¹⁰ The proposed treaty provides for verification of the elimination or diversion of chemical weapons by means of international inspectors and automatic monitoring equipment.¹¹ Finally, the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction¹² is similar to the 1925 Geneva Protocol in that it does not contain a fully developed compliance system. A review conference on the Convention is scheduled to begin this year.¹³ A comprehensive handbook recommending requirements and procedures for investigations is therefore likely to prove extremely useful in structuring verification mechanisms for these and other arms control agreements.

Prompt, on-site inspection in conjunction with subsequent analysis by an impartial international group of experts is the preferred means of investigating alleged violations of the Geneva Protocol, and a comprehensive set of established procedures can facilitate the task. The Canadian *Handbook* supplies procedures and checklists that supplement, and in certain cases extend, the provisional procedures devised by the Group of Consultant Experts. It addresses the most difficult situation: conducting an on-site investigation in a remote area. The *Handbook* assumes that access to the site where the

⁷ The need for further guidance was indirectly identified by the authors of the Report in acknowledging their inability to produce a standard handbook of procedures for the expert teams. Report, *supra* note 5, para. 85. In addition, they invited governments and concerned organizations to direct the Secretary-General's attention to any new information on technical aspects of procedures or documentation. *Id.*, para. 91.

⁸ Canadian Delegation to the United Nations, Press Release No. 65, Dec. 4, 1985 (New York). The *Handbook for the Investigation of Allegations of the Use of Chemical or Biological Weapons* [hereinafter the *Handbook*], published in November 1985, is the culmination of a study conducted by scientists and governmental officials under the auspices of the Verification Research Programme of the Arms Control and Disarmament Division of the Department of External Affairs.

⁹ GA Res. 40/152 O (Dec. 16, 1985). Canada initiated the resolution, which is the first of its kind to have received unanimous support.

¹⁰ UN Doc. A/40/27 (1985). Negotiations resumed in Geneva on Feb. 4, 1986. N.Y. Times, Feb. 5, 1986, at A3, col. 1.

¹¹ Art. IV, Ann. IV, sec. III, UN Doc. A/40/27 (1985).

¹² Apr. 10, 1972. 26 UST 583, TIAS No. 8062, *reprinted in* 11 ILM 309 (1972).

¹³ GA Res. 39/65D (Dec. 12, 1984).

alleged attack with chemical or biological weapons occurred will be possible,¹⁴ that experts can be equipped to examine two sites and that a base camp with independent analytical capacity can be set up. The third assumption minimizes the number of people handling the data and makes information available promptly to guide further sampling and to provide more effective medical treatment.

The verification process consists of three components: preparation, evaluation of complaints and investigation.¹⁵ The *Handbook* deals extensively with all aspects of the preparatory and investigative phases, including resources and training, on-site screening and sampling, base camp analysis, interviewing, transmission of samples to designated laboratories and laboratory analysis. It does not discuss the evaluation of complaints because the Report issued by the Group of Consultant Experts already sets forth criteria for the Secretary-General to use in determining whether to initiate an investigation.¹⁶

The *Handbook* outlines the respective roles of the international authority and the experts, and recommends procedures to maximize the effectiveness of each. At present, the Secretary-General constitutes the international authority: he is authorized to conduct investigations and, when the need arises, to assemble an inspection team from a list of experts recommended by member states.¹⁷ However, the future Convention on Chemical Weapons is expected to establish an international technical secretariat with independent analytical capability. The secretariat would maintain a staff of highly trained experts equipped with the necessary instruments and supplies—all ready to be dispatched to the site of an attack on short notice. This body would then direct the verification process, at least with respect to chemical weapons.

The international authority described in the *Handbook* performs preliminary and regional support activities. Once it makes the critical decision to conduct an investigation, it must seek access to the site of the attack. If an on-site investigation is feasible, the international authority makes the appropriate arrangements, which may include negotiating cease-fire agreements and obtaining clearances. It must simultaneously assemble the team of experts, prepare its supplies and equipment, brief the team, apportion responsibilities and dispatch the group either to the site or to a proximate holding point. The international authority continues to act as the liaison between the experts and the host state during the investigation, arranging briefings with officials and interviews with witnesses. It is also responsible for the security of the samples and data.¹⁸

The *Handbook* also identifies training programs and resources that should prove useful to experts working under time pressures and dangerous con-

¹⁴ The Report directs the Secretary-General to select a neighboring country for the base camp if access to the site is not feasible. Report, *supra* note 5, para. 19. In case a government denies access, or is unable to guarantee the team's security or logistical support, the Report suggests selecting experts to evaluate the available data and continuing to try to arrange for an on-site inspection. *Id.*, para. 23.

¹⁵ *Id.*, para. 70.

¹⁷ GA Res. 37/98D, *supra* note 4.

¹⁶ *Id.*, paras. 13–16.

¹⁸ See *infra* text accompanying note 19.

ditions. Using a functional approach, it concludes that an investigating team meeting the minimum requirements for an effective inspection should consist of suitable personnel for sample collection, base camp analysis and interviewing. Depending upon the size of the site and the complexity of the required analysis, the basic team may be supplemented with experts in specialized fields. The manual also lists the minimal amount of personal protective gear, on-site screening, base analysis and support equipment, and decontamination, sampling, packaging and medical provisions that should accompany the team or be supplied by the host country.

The study goes beyond the Report in suggesting that the team would function best if the specialized equipment and required supplies could be installed in its own vehicles. Because there is currently no opportunity for the experts to practice as a team or with the equipment, the *Handbook* also recommends that the Secretary-General consider establishing a training program, on an individual or a team basis. Further, it emphasizes that to enhance safe and efficient performance, the experts should be adequately instructed in personal protection, the identification of hazards and base camp analysis.

The *Handbook* makes clear that sampling, base camp analysis and interviewing are interdependent. It guides the experts during all phases of the inspection, suggesting specific procedures to follow during on-site screening, sampling (including the collection of "control" samples), temporary packaging, base camp analysis and preparation for distribution to designated laboratories for further analysis. To facilitate preliminary analysis and the provision of medical treatment, it also includes detailed tables describing the properties and symptoms of known chemical and biological warfare agents.

Interviewing victims, witnesses and government officials about the attack, both before and during the on-site inspection, constitutes an integral part of a thorough investigation. Using an epidemiological (disease-oriented) approach, the *Handbook* expands upon the questions in the experts' Report: the comprehensive questionnaires cover the medical history of the indigenous population, as well as all aspects of the attack, including its effect on animals and vegetation. The questionnaires, though coded to permit computer tabulation, may be too long for practical purposes and prove more cumbersome than helpful. However, the *Handbook* notes that certain individuals may be motivated to fabricate or exaggerate aspects of their account. The lengthy surveys are designed, in part, to reveal inconsistencies and to detect such conduct. The questionnaires also request that the interviewer evaluate the credibility of the subject and the evidence.

The Canadian study recognizes that impartial experts, precise data collection and corroborative analysis by different laboratories are critical to the success of the investigation. An unbroken chain of custody is essential to substantiating whatever conclusions are reached. Accordingly, procedures are designed to ensure accurate documentation at every step in sampling, transporting, storing and analyzing the data. Logbooks, questionnaire response sheets, photographs, videos and tape recordings are to be maintained at the site and delivered subsequently to the international authority. Experts

are expected to label, test and package all evidence with the utmost care. Secure transport of the samples to the designated laboratories, discussed at great length in the Report, also preserves the integrity of the conclusions. As further protection, one set of the samples sent to the laboratories is to be retained by the investigating team and given to the international authority.¹⁹

The Canadian *Handbook* promises to be an invaluable aid to the international community in evaluating allegations of the use of chemical or biological weapons. It recommends detailed procedures and develops various checklists to maximize the effectiveness of both the international authority and the expert team. It also summarizes important technical information regarding the sampling and analysis of chemical and microbiological agents. Most significantly, it serves the critical function of establishing a credible method of collecting, processing and analyzing data obtained during on-site inspections and interviews. Consequently, the results of an investigation guided by the *Handbook* will probably be difficult to dispute. Until the Conference on Disarmament concludes the proposed convention prohibiting the production of chemical weapons, which will likely include a formal international verification system, the *Handbook* should assist the Secretary-General and chosen experts in investigating alleged violations of the 1925 Geneva Protocol.

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THE IX INTER-AMERICAN INDIAN CONGRESS

Forty-five years ago, U.S. Indian Commissioner John Collier helped persuade the members of the Pan American Union (now the Organization of American States) to establish the Inter-American Indian Institute "to elucidate the problems affecting the Indian groups within their respective jurisdictions, and to cooperate with one another, on a basis of mutual respect for the inherent rights of each to exercise absolute liberty in solving the 'Indian Problem' in America." Operating under an international convention concluded in November 1940 and governed by a board of 21 state representatives, the Mexico City-based Institute is charged with "scientific investigations," technical assistance to national Indian agencies and "the training of men and women experts devoted to the problems of the Indian." Institute policy is also guided by an Inter-American Indian Congress of governmental administrators of Indian affairs, which is convened every four years.¹

The Institute is directed, by Article IV(2)(e) of the Convention, to "solicit, collect, arrange and distribute reports on . . . [r]ecommendations made by the Indians themselves in regard to any matters of concern to their people."

¹⁹ This procedure might have averted the sabotage problem encountered by the expert team that investigated allegations of the use of "yellow rain" in Southeast Asia in 1980-1981. For a description of that incident, see T. FRANCK, *supra* note 3, at 249.

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¹ Convention providing for the Creation of the Inter-American Indian Institute, *opened for signature* Nov. 1, 1940, 56 Stat. 1303, TIAS No. 978.

Nevertheless, Indians have had no formal access to the Institute or congresses similar to the consultative status that several indigenous nongovernmental organizations have enjoyed at the United Nations Economic and Social Council since 1977. Yet a consensus is emerging among Latin American scholars that Indian participation should be encouraged in the spirit of self-determination. In his 1983 report to the UN Commission on Human Rights, Ecuadorean diplomat José R. Martínez Cobo recommended that any "[a]ction in regard to the rights and freedoms of indigenous populations should be based on close contact, consultation, and the fullest measure of co-operation with non-governmental organizations, particularly those established by indigenous populations."² Moreover, Argentina and Colombia, among other states, are amending their Indian legislation to strengthen consultation at the national level.³

Several governments invited Indians to attend the VIII Congress at Mérida, Mexico in 1980, but they were only allowed to address an off-the-record "open forum." Encouraged by the U.S. host committee, a far greater number of Indian observers were invited to the IX Congress at Santa Fe, New Mexico—nearly three hundred, about two-thirds of them from the United States. The 5-day meeting, held from October 28 to November 1, 1985, was also attended by directors of the Indian bureaus of Brazil, Colombia, Costa Rica, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Peru, the United States and Venezuela, as well as by representatives of Chile, Ecuador, Honduras and Paraguay. Canada, the Holy See, Italy and Spain participated as nonvoting observers, together with the Organization of American States, the International Labour Organisation, UNESCO, the World Bank and other international agencies. Finally, some two hundred individual non-Indian observers, chiefly academics, were present.

According to the rules of procedure adopted for the congress, all "world, hemispheric, regional and national Indian organizations" were entitled to attend the plenary sessions and working committees as observers, without the need for governmental sponsorship. They were not entitled, however, to "speak or vote" in the plenary sessions, where the respective committee chairmen were to make reports and submit resolutions for consideration and adoption.⁴ Instead, Indians were invited to attend two "open forums" outside the formal committee structure and without official status. Rejecting this role, Indian observers demanded that the rules be amended as follows: "In addition to the working committees established in accordance with the agenda, there shall be a special working committee consisting of the non-governmental indigenous delegations, which shall have the same opportunity to present and discuss its proposals at the plenary sessions of the Congress."

² UN Doc. E/CN.4/Sub.2/1983/21/Add.8, para. 355.

³ Informe Nacional de Argentina, Inter-American Indian Institute Doc. OAS/Ser.K/XXV.1.9, CII/NR. 1/85; Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Colombia, UN Doc. CERD/C/112/Add.1 (1984).

⁴ Draft Rules of Procedure, Inter-American Indian Institute Doc. OAS/Ser.K/XXV.1.9, CII/Doc. 2/85, Rules 10(f), 11, 23, 24 and 25.

In response, the governmental delegations recessed the congress for nearly 2 days, during which several delegations reportedly threatened to walk out if the Indian demands were met. A subcommittee (consisting of Brazil, Mexico, Nicaragua, Peru and the United States) broke the deadlock. Stating that it was "not necessary or justified to modify the rules as requested," the subcommittee recommended allowing the conclusions *and recommendations* of the "open forum" to be read at the closing plenary session if they did "not contain critical references to any country or its institutions." The subcommittee also suggested that the Institute's secretariat be directed to prepare a proposal to "institutionalize" the Indian forum at future congresses.⁵ Governments accepted this compromise and the Indian organizations reluctantly acceded, on the penultimate day of the meetings.

Indian observers accordingly reconvened their "open forum"; asked the chairman previously appointed by the Institute, Mexican sociologist Rudolfo Stavenhagen, to step down; elected their own chairman, José Rojas of the Asociación Indígena de Costa Rica; and declared themselves the "Indian Forum/Foro Indio." Over the next 24 hours, the Indian Forum reviewed more than 30 reports and draft resolutions from national Indian organizations, mostly Latin American, and the next day José Rojas became the first Indian spokesman to read a report to the congress in its history.

There was another confrontation, however, when it came time to read the Indian Forum's specific recommendations, which described situations in Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Nicaragua, Paraguay and Venezuela, as well as the United States and Canada. Chile, joined by several of the other Latin American states, objected, while Mexico and Costa Rica argued that the congress could have no legitimacy without hearing from Indians directly. In the end, the governments voted 11-4 in favor of a U.S. proposal to read the recommendations after deleting any preambular language.

In addition to the precedent set by hearing the report and recommendations of the Indian Forum, which was underscored by the U.S. chairman of the plenary, Richard Montoya, in his closing remarks, the congress voted nearly unanimously to recommend: (1) that states include Indians in their official delegations to the X Congress to be held in Argentina, and (2) that the Institute "submit to the Xth Congress draft rules concerning the establishment of a Committee of Indigenous Delegates to discuss indigenous concerns."⁶ While this does not settle the question of a permanent, nongovernmental Indian committee with standing to submit resolutions, as the Indian Forum itself proposed, Latin American Indians in particular felt that progress had been made in securing a voice at the regional level. When the next

⁵ Report of the Subcommittee Appointed by the Meeting of the Chiefs of Delegations to Analyze the Request Submitted to the Meeting for a Change in the Regulations Permitting the Creation of a Special Committee, Inter-American Indian Institute Doc. OAS/Ser.K/XXV.1.9, CII/Doc. 15/85.

⁶ Res. 29, Inter-American Indian Institute Doc. OAS/Ser.K/XXV.1.9, CII/Doc. Res./29, Rev.1/85. Venezuela abstained from voting on any resolutions on procedural grounds.

congress convenes in 1990, it will no longer be an exclusively governmental domain, but more of a public exchange between governments and Indian organizations—which, after all, can represent a more concrete achievement than paper declarations.

RUSSEL LAWRENCE BARSH*

THE THREE "THEME" SPECIAL RAPPOORTEURS OF THE
UN COMMISSION ON HUMAN RIGHTS

In March 1982, the United Nations Commission on Human Rights initiated the appointment of a Special Rapporteur on Summary or Arbitrary Executions. The Special Rapporteur on Summary or Arbitrary Executions has done far more than merely study that grave human rights problem; he has received complaints about impending and past executions, issued appeals to governments about threatened executions and the need to investigate past killings, and reported publicly on much of his activity. The Commission on Human Rights not only has renewed the Special Rapporteur on Summary or Arbitrary Executions in its subsequent annual sessions, but has followed this precedent by appointing in 1985 a similar Special Rapporteur on Torture and in 1986 a Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief.

The development of the "theme" special rapporteur is a relatively new and remarkably flexible approach to implementing international human rights norms. Although the concept grew out of the practice of the Working Group on Enforced or Involuntary Disappearances, the special rapporteur, as a single individual of recognized international standing, is ordinarily less expensive and less visible, as well as more efficient, than the five-member working group in achieving similar objectives.

The Working Group on Enforced or Involuntary Disappearances

The Working Group on Enforced or Involuntary Disappearances, which was initiated by the Commission on Human Rights in 1980,¹ has developed an effective approach to coping with the human rights violations within its narrow mandate.² The evolution of the working group not only has given guidance to the special rapporteurs, but has presaged how their activities will develop.

* The author attended the congress as an observer for the Four Directions Council, a non-governmental organization in consultative status with the United Nations Economic and Social Council, and foreign affairs officer for the Sante' Mawi'omi wjit Mikmaq (Mikmaq Grand Council).

¹ Comm'n on Human Rights [hereinafter cited as CHR] Res. 20 (XXXVI), UN Doc. E/CN.4/1408, at 180 (1980).

² See Berman & Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531, 557-59 (1982); Reports of the Working Group on Enforced or Involuntary Disappearances, UN Docs. E/CN.4/1435 (1981); E/CN.4/1492 (1981); E/CN.4/1983/14; E/CN.4/1984/21 and Add.1; E/CN.4/1985/15; E/CN.4/1986/18.

The resolution that established the Working Group on Enforced or Involuntary Disappearances gave that body of five members authority (1) to "examine questions relevant to enforced or involuntary disappearances"; (2) to "seek and receive information from governments, intergovernmental organizations, humanitarian organizations and other reliable sources"; and (3) "to bear in mind the need to be able to respond effectively to information that comes before it and to carry out its work with discretion." It was directed to report to the Commission's next session.³ While the mandate of the working group to "examine questions" might at first glance appear to suggest an academic study of the issue, the working group relied principally upon its authority to "respond effectively" in raising specific cases of disappearances and in requesting responses from governments without seeking any publicity about the cases.

After receiving the working group's first report,⁴ the Commission extended the group's tenure for another year, but made several significant changes in its mandate to reflect both approval of and some limitations on its activities.⁵ The Commission noted that governments had not always given the working group the full cooperation "warranted by its strictly humanitarian objectives and its working methods based on discretion."⁶ The working group had embarrassed the Argentine Government by reprinting its reply⁷ in full, and thus the group was reminded "to discharge its mandate with discretion"; on the one hand, it should "protect persons providing information," and on the other, "limit the dissemination of information provided by Governments."

While the Commission simply extended the working group's mandate in 1982 and 1983 without making significant changes, it did express "complete confidence" in the group.⁸ In 1984 the Commission for the first time requested that the working group "help eliminate the practice of enforced or involuntary disappearances" and encouraged governments to permit the group to make site visits to fulfill "its mandate more effectively."⁹ The Commission continued this approach in 1985.¹⁰

The working group's sixth annual report, delivered to the Commission in 1986,¹¹ follows the general approach of the group's previous reports.¹² In 1985, for example, the group reported having received 4,500 allegations of enforced or involuntary disappearances and it had transmitted some 2,200 sufficiently documented cases to various governments.¹³ The 1986 report

³ CHR Res. 20, *supra* note 1, at 180-81.

⁴ UN Doc. E/CN.4/1435 and Add.1 (1981).

⁵ CHR Res. 10 (XXXVII), UN Doc. E/CN.4/1475, at 209-10 (1981).

⁶ *Id.*

⁷ UN Doc. E/CN.4/1435, Ann. IX (1981); *see also id.*, Anns. XI and XII.

⁸ CHR Res. 1982/24, UN Doc. E/CN.4/1982/20, at 139-40; CHR Res. 1983/20, UN Doc. E/CN.4/1983/60, at 148-49.

⁹ CHR Res. 1984/24, UN Doc. E/CN.4/1984/77, at 57-58.

¹⁰ CHR Res. 1985/20, UN Doc. E/CN.4/1985/66, at 53-54.

¹¹ UN Doc. E/CN.4/1986/18.

¹² *Id.* at 1.

¹³ *Id.* at 5.

names the 34 countries about which information on disappearances had been received. It provides data for all 34 countries on the number of cases reported, the efforts of the government to clarify them and the number resolved. As for the 16 countries with a hundred or more disappearances, the report—besides assessing the reported cases and the efforts to resolve them—in a new departure includes a historical graph tracing the occurrence of disappearances over the years. While the report does not correlate the frequency of disappearances with changes in governmental leadership and other aspects of the situation in each nation, such a correlation could easily be accomplished by interested analysts.

The working group has visited five countries altogether. For the first time in 1986, it issued a separate fact-finding account, which concerns a visit to Peru.¹⁴ The report is well prepared and thorough, and a very useful guide to the situation there.

For the second year in a row, the working group recommended to the Commission that its mandate be extended for 2 years rather than just one, as had been the practice with working groups, special rapporteurs and special representatives.¹⁵ In 1986 the Commission granted the request on an experimental basis, with the understanding that the group would continue to report on an annual basis.¹⁶ Next year there will probably be a similar proposal to extend the mandate of the Special Rapporteur on Summary or Arbitrary Executions or that of the Special Rapporteur on Torture.

The Working Group on Enforced or Involuntary Disappearances has developed incrementally into an effective human rights implementation mechanism on no broader a consensual basis than a consensus of the Commission on Human Rights and without the authority of any human rights treaty beyond the United Nations Charter. The special rapporteurs are gradually following in the footsteps of the working group.

The Special Rapporteur on Summary or Arbitrary Executions

The Special Rapporteur on Summary or Arbitrary Executions was the first special rapporteur on a theme or particular kind of human rights violation. The 1982 mandate of the special rapporteur was styled to some extent upon the 1980 resolution that established the working group, that is, to "examine the questions related to summary or arbitrary executions" and to report annually to the Commission on the rapporteur's activities.¹⁷

The Commission had for several years been appointing special rapporteurs and special representatives for particular countries. For example, at its 1986 session the Commission on Human Rights received fact-finding reports from special rapporteurs or special representatives on human rights situations in

¹⁴ UN Doc. E/CN.4/1986/18/Add.1.

¹⁵ UN Doc. E/CN.4/1986/18, at 103.

¹⁶ UN Doc. E/CN.4/1986/L.76, adopted with one amendment and without a vote on Mar. 13, 1986.

¹⁷ CHR Res. 1982/29, UN Doc. E/CN.4/1982/30, at 2-3, 147.

Afghanistan,¹⁸ Chile,¹⁹ El Salvador,²⁰ Guatemala²¹ and Iran.²² These "country" investigators can provide thorough, relatively detailed, well-analyzed reports that establish what the international community knows about particular situations. They make contacts with the government concerned and may thus attempt to encourage resolution of the human rights problems in question, but they are not authorized to "respond effectively" to violations.²³ They are necessarily less balanced and less global than the theme special rapporteurs who look at a human rights phenomenon wherever it appears around the world. Both types of special rapporteurs, however, rely on similar sources of information, including nongovernmental organizations such as Americas Watch, Amnesty International, Helsinki Watch, the International Commission of Jurists, the International Human Rights Law Group, the International League for Human Rights, the Lawyers Committee for Human Rights and a number of national human rights organizations.

Although his position was initiated in March 1982 and his authority confirmed by the Economic and Social Council in May 1982, the first Special Rapporteur on Summary or Arbitrary Executions, Amos Wako of Kenya, was not actually appointed by the Chairman of the Human Rights Commission until August of that year. Rather than take the incremental approach handed down by the Working Group on Enforced or Involuntary Disappearances, Mr. Wako's first report attempted to begin at the level of activity that the working group had achieved after several years. He evidently failed to note that the authorizing resolution did not instruct him to "respond effectively," but only to gather information, examine the question and report to the Commission.²⁴ Instead, he had ambitiously identified 37 governments that had allegedly been responsible for summary or arbitrary executions; he had then sent the allegations to those governments, and the responses of 16 of them were summarized forthrightly in his report.²⁵

This first report was roundly criticized by members of the Commission—particularly by representatives of the governments that had been discussed. Consequently, Mr. Wako was again in 1983 not given authority to "respond effectively" to summary or arbitrary killings. His second and third reports omitted most references to countries,²⁶ except for reprinting the telexes he

¹⁸ UN Doc. E/CN.4/1986/24; see UN Doc. A/40/843 (1986). The Commission also for many years has appointed special rapporteurs to engage in various studies without expecting that they would take action on human rights violations. See, e.g., Rannat, Study of Equality in the Administration of Justice, UN Doc. E/CN.4/Sub.2/296/Rev.1 (1972); Inglés, Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country, UN Doc. E/CN.4/Sub.2/220/Rev.1 (1963).

¹⁹ UN Doc. E/CN.4/1986/2; see UN Doc. A/40/647 (1985).

²⁰ UN Doc. E/CN.4/1986/22; see UN Doc. A/40/818 (1985).

²¹ UN Doc. E/CN.4/1986/23; see UN Doc. A/40/865 (1986).

²² UN Doc. A/40/874 (1985). The special representative of the Commission presented an interim report to the General Assembly, but resigned before he had completed his report to the Commission.

²³ See, e.g., CHR Res. 1985/35, UN Doc. E/CN.4/1985/66, at 74 (mandate of special rapporteur on El Salvador).

²⁴ CHR Res. 1982/29, *supra* note 17, at 147.

²⁵ UN Doc. E/CN.4/1983/16.

²⁶ UN Docs. E/CN.4/1984/29 and E/CN.4/1985/17.

had continued to send, without clear authority, in an attempt to avert specific summary or arbitrary executions. Accordingly, the special rapporteur's reports became less controversial; his mandate was more easily renewed in 1984²⁷ and 1985,²⁸ and he was finally given authority to "respond effectively to information that comes before him."

The fourth report²⁹ largely returned to the practice of identifying the governments that had allegedly engaged in summary or arbitrary executions. Indeed, the greatest part of the report contained the substance of the special rapporteur's appeals against summary or arbitrary executions during the previous year, the requests made by the special rapporteur for information about past executions and the responses of governments. This laudable record demonstrated that the special rapporteur had finally achieved the credibility he had sought at first and that his initially weak authority had been enhanced by the Commission. The report indicates that the special rapporteur has been quite active in pursuing his mandate and in attempting to prevent summary or arbitrary executions. The report makes no effort, however, to resolve the issues raised by the allegations and the replies of governments, and it makes only a rudimentary effort to synthesize the material presented and to draw useful conclusions and recommendations.

Two aspects of the special rapporteur's fourth report may illustrate its defects and the potential for future work. These two aspects relate to juvenile executions and the development of standards for the adequate investigation of suspicious deaths, including adequate autopsies.

Juvenile Executions. In his fourth report, the special rapporteur notes that he made an appeal to the Minister of Foreign Affairs of Bangladesh to prevent the execution of a student aged 16 or 17 who had been condemned to death by a special military court in Dhaka.³⁰ The report fails to recount that the special rapporteur had made appeals to the Government of the United States on behalf of two youths who faced execution in South Carolina and Texas for offenses committed while they were under the age of 18. The U.S. Government apparently responded to the appeal on behalf of the Texas youth; it questioned the special rapporteur's authority to make such appeals. Instead of reprinting the appeals and the response, the special rapporteur made the following statement in the last paragraph of his report:

In conclusion, the Special Rapporteur would like to refer to one issue which he feels deserving of further consideration by the Commission. The International Covenant on Civil and Political Rights proscribes the application of the death penalty to anyone below the age of 18 at the time when the offence was committed. While some reservations have been formally entered to this provision, the Covenant nevertheless has a special status, having been proclaimed and adopted by the General Assembly and having received for the most part widespread acknowledgement throughout the international community. In some recent

²⁷ CHR Res. 1984/50, UN Doc. E/CN.4/1984/77, at 8-9, 85.

²⁸ CHR Res. 1985/37, UN Doc. E/CN.4/1985/66, at 3-5, 79 (adding "in particular when a summary or arbitrary execution is imminent or threatened").

²⁹ UN Doc. E/CN.4/1986/21.

³⁰ *Id.* at 4-5.

instances the attention of the Special Rapporteur has been drawn to persons executed or about to be executed, having been duly convicted and sentenced in accordance with the law although it has been established beyond doubt that they were under 18 years of age when the crimes in question were committed. These executions have posed a difficult principle for the Special Rapporteur because, while it is clear that the persons in question were duly tried and sentenced and had every opportunity to appeal, the point nevertheless remains that a United Nations standard of global validity was not adhered to. The Special Rapporteur feels that this issue deserves further examination and he would be grateful for such guidance as the Commission may be able to offer on this question.³¹

In response to this request for advice, the Norwegian delegate stated that the

Special Rapporteur has, quite rightly, reminded us that the International Covenant on Civil and Political Rights prohibits the application of the death penalty to anyone below the age of 18 when the offence was committed. The Norwegian Government agrees that this issue deserves further examination. We believe that such cases are within the mandate of the Special Rapporteur and should be included in future reports.³²

This advice is particularly significant because Norway was the chief sponsor of the resolution³³ that extended the mandate of the special rapporteur and because this view was not contradicted by any other delegation.

Amnesty International and one other nongovernmental organization elaborated on the Norwegian views by recalling that Article 6(5) of the International Covenant on Civil and Political Rights provides that the sentence of "death shall not be imposed for crimes committed by persons below eighteen years of age."³⁴ This provision may not be the subject of derogation under any circumstances. Similar provisions are found in Article 4(5) of the American Convention on Human Rights³⁵ and Article 68 of the Geneva Convention on the Protection of Civilians in Time of War.³⁶ The special rapporteur notes in his report that "some reservations" have been entered to Article 6(5) of the Covenant, but this statement appears to be incorrect. No government has made a reservation on the prohibition of juvenile executions.³⁷

³¹ *Id.* at 100.

³² Statement by Representative of Norway to Commission on Human Rights, Mar. 6, 1986, at 10 (in the author's files).

³³ UN Doc. E/CN.4/1986/L.68, adopted without a vote on Mar. 11, 1986.

³⁴ Art. 6(5), GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

³⁵ ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 29, Art. 4(5), OEA/Ser.L/V/II.60, doc. 28, rev.1 (1983).

³⁶ Art. 68, Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287 (entered into force Oct. 21, 1950).

³⁷ In proposing a general reservation to the death penalty limitations of Article 6 of the Civil

Over two-thirds of the governments of the world have entirely rejected executions of juveniles by having ratified either the International Covenant or the American Convention, or both; having abolished the death penalty totally or allowing it for exceptional crimes only; or having exempted juveniles from the death penalty. In those countries which still permit the death penalty, juvenile executions are exceedingly rare in practice. Since 1979 there have been 11,000 executions in 80 countries; but only 7 of them in five countries were for offenses committed while under the age of 18.³⁸

The rapporteur's mandate clearly encompasses appeals to prevent the execution of juvenile offenders. The special rapporteur may be guided in this regard by the UN Secretary-General; in January of this year, he issued a public appeal for the life of a young man in South Carolina who was 17 at the time of his offense but had a mental age of only 12. Javier Pérez de Cuéllar acted pursuant to General Assembly Resolution 36/22, which called upon the Secretary-General "to use his best endeavours in cases where the minimum standard of legal safeguards [in the International Covenant on Civil and Political Rights] appears not to have been respected."³⁹ Commission on Human Rights Resolution 1985/37 confers essentially the same mandate on Special Rapporteur Wako: "to respond effectively to information that comes before him, in particular when a summary or arbitrary execution is imminent or threatened."⁴⁰ Considering this mandate, the discussion at the 42d session of the Commission ought to constitute sufficient guidance for the special rapporteur to continue his efforts to prevent the execution of youthful offenders.

Investigations of Suspicious Deaths. On December 13, 1985, the General Assembly adopted Resolution 40/143 on summary or arbitrary executions; it requested that the special rapporteur "consider in his next report possible measures to be taken by the appropriate authorities when a death occurs in custody, including adequate autopsy."⁴¹ In only a few weeks, the special rapporteur's report was scheduled for submission to the February-March 1986 session of the Human Rights Commission. His initial response appeared in the following paragraph:

and Political Covenant, the Department of State declared that its purpose was "certainly not the preservation of any right to execute children or pregnant women, something never done in the United States." *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 1, 55 (1979) (response by Department of State).

³⁸ See Letter from Eric Prokosch, Coordinator of Amnesty International Program for the Abolition of the Death Penalty, to Mary E. McClymont, Feb. 19, 1986: "In addition, Amnesty International received a number of reports of executions of prisoners under 18 years old in Iran, but the organization was unable to give an exact total."

³⁹ GA Res. 36/22, 36 UN GAOR Supp. (No. 51) at 168, UN Doc. A/36/51 (1982). The resolution specifically refers to "the provisions on capital punishment in the International Covenant on Civil and Political Rights, particularly its articles 6, 14 and 15." Furthermore, in General Assembly Resolution 35/172, entitled "Arbitrary or summary executions," member states are urged to "respect as a minimum standard the content of the provisions of articles 6, 14, and 15 of the International Covenant on Civil and Political Rights." GA Res. 35/172, 35 UN GAOR Supp. (No. 48) at 195, UN Doc. A/35/48 (1981).

⁴⁰ CHR Res. 1985/37, UN Doc. E/CN.4/1985/66, at 79.

⁴¹ GA Res. 40/143 (Dec. 13, 1985).

One of the ways in which Governments can show that they want this abhorrent phenomenon of arbitrary or summary executions eliminated is by investigating, holding inquests, prosecuting and punishing those found guilty. There is therefore a need to develop international standards designed to ensure that investigations are conducted into all cases of suspicious death and in particular those at the hands of the law enforcement agencies in all situations. Such standards should include adequate autopsy. A death in any type of custody should be regarded as *prima facie* a summary or arbitrary execution and appropriate investigations should immediately be made to confirm or rebut the presumption. The results of investigations should be made public.⁴²

One nongovernmental organization⁴³ commented on the need for international standards on the investigation of suspicious deaths, including adequate autopsy. There are many reasons for such standards, the most basic of which is to ensure that an adequate autopsy and investigation are performed in the often too brief time when an optimal autopsy examination and investigation are possible. In controversial cases, proponents of different interpretations may take advantage of any shortcomings in the investigation; it therefore behooves forensic physicians and other investigators to tolerate as few omissions or discrepancies as possible. Finally and perhaps most importantly, the existence of internationally accepted standards will enable the international community of forensic scientists, police officers, prosecuting lawyers and judges to provide support, some protection and autonomy for physicians and investigators who might otherwise be intimidated by their governments or other groups into performing inadequate investigations or reaching unjustified conclusions.

In response to such concerns, the Commission on Human Rights took note of "the need to develop international standards designed to ensure that proper investigations are conducted by appropriate authorities into all cases of suspicious death, including provisions for adequate autopsy."⁴⁴ The Commission then invited the special rapporteur "to receive information from appropriate United Nations agencies and other international organizations and to examine the elements to be included in such standards and to report to the Commission on Human Rights on progress made in this respect."⁴⁵

The Special Rapporteur on Summary or Arbitrary Executions has not been as careful and successful in developing his mandate as the Working Group on Enforced or Involuntary Disappearances. Nevertheless, he has generally followed the approach of the working group and has been given the additional responsibility of helping to develop standards on such important subjects as international norms for the investigation of summary or arbitrary killings. As will be seen below, the Special Rapporteur on Torture has benefited both from the mistakes of the Special Rapporteur on Summary

⁴² UN Doc. E/CN.4/1986/21, at 99.

⁴³ See UN Press Release HR/1848, Mar. 4, 1986, at 6; UN Press Release HR/1848/Corr.1, Mar. 10, 1986.

⁴⁴ UN Doc. E/CN.4/1986/L.68; see note 33 *supra*.

⁴⁵ UN Doc. E/CN.4/1986/L.68.

or Arbitrary Executions and from the guidance afforded by the Working Group on Enforced and Involuntary Disappearances.

The Special Rapporteur on Torture

During its session in 1985, the Commission on Human Rights established a Special Rapporteur on Torture with the authority to "respond effectively to credible and reliable information" on torture.⁴⁶ It was understood at the time that the Chairman of the Human Rights Commission would appoint Professor P. H. Kooijmans of the Netherlands. Professor Kooijmans had been the head of the Netherlands delegation that had led the effort to establish a special rapporteur. In addition, the selection of the Dutch delegate seemed appropriate since the Netherlands was relinquishing its seat on the Commission to give Belgium an opportunity to represent the Benelux countries. The special rapporteur's first report was to be presented to the Commission at its 42d session in 1986.⁴⁷

In many ways, the special rapporteur's report is a model first step in what promises to be a very effective United Nations approach to a serious human rights problem. Professor Kooijmans describes the nature of the problem, his mandate, international legal norms against torture⁴⁸ and his activities, including the material he received from governments, the Organization of American States and nongovernmental organizations such as Amnesty International. He established his authority to transmit allegations of torture to national authorities by sending such information to 33 governments. The special rapporteur avoids angering these governments unnecessarily in his initial report by identifying only those nations which were already on the Commission's agenda, that is, Afghanistan, Chile, El Salvador, Guatemala and Iran.⁴⁹

Professor Kooijmans also records that he engaged in consultations with governments, nongovernmental organizations and individuals; without identifying those involved, he thus established his authority to undertake such consultations. In addition, he reports his decision to make eight urgent appeals to governments to prevent the occurrence of torture in Chile, the Comoros, Ecuador, Honduras, Indonesia, South Africa, Uganda and the USSR. The special rapporteur identifies some of these urgent situations very briefly and is careful to describe the governmental response, if any. For example, the report states, "The Special Rapporteur was informed that the USSR rejected the allegation sent to it as baseless and false and pointed out that the action of the Special Rapporteur violated the provisions of the Commission resolution 1985/33."⁵⁰ While the report does not contain even

⁴⁶ CHR Res. 1985/33, UN Doc. E/CN.4/1985/66, at 71.

⁴⁷ Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1986/15.

⁴⁸ E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1986).

⁴⁹ UN Doc. E/CN.4/1986/15, at 16.

⁵⁰ *Id.* at 17.

a vague description of the problem that prompted this brusque reply, it appears to have been reports of psychiatric abuse in the USSR.⁵¹

The remainder of the report largely deals with national legislative provisions forbidding torture; the barring of statements induced by torture as evidence in proceedings; the provision of remedies, such as *amparo* or habeas corpus, for torture allegations; and legislative provisions on matters creating a risk of torture, such as incommunicado detention, states of emergency and trade in implements of torture. Although countries are very rarely identified, except in a positive light, the United States is mentioned because of the export regulations regarding "specially designed implements of torture."⁵² The report concludes by listing the kinds of torture that have been identified, analyzing briefly the relationship between torture and other sorts of human rights violations (such as disappearances, arbitrary killings) and submitting a set of recommendations.

In general, the special rapporteur's work was well received by the Commission in March 1986. Some human rights advocates did find fault with one of Kooijmans's recommendations, i.e., "Incommunicado detention should be kept as short as possible and should not exceed seven days."⁵³ While they welcomed the special rapporteur's concern that incommunicado detention might foster torture, they were worried that specifying 7 days might make permissible such a lengthy period of incommunicado detention, during which torture might be undertaken.

When the Commission debated the agenda item entitled "Question of the human rights of all persons subjected to any form of detention or imprisonment," which includes a review of the work of the Special Rapporteur on Torture, the Australian delegation introduced an idea borrowed from the Special Rapporteur on Summary or Arbitrary Executions: that international standards be set for investigations into "cases of suspicious death, and that these investigations should include an adequate autopsy." Australia pointed to "the general need for accurate information to determine the cause of death where there is suspicion of torture" and reiterated the advantages international standards would confer on practitioners that were mentioned in the debate on summary and arbitrary executions.⁵⁴

Although these sentiments were not reflected in the Belgian resolution to prolong the special rapporteur's mandate for another year, the Commission is definitely beginning to see the theme special rapporteurs as a mechanism not only for implementing human rights norms but also for developing standards. Ireland, Norway and the United States cosponsored the resolution as members of the Commission, and the Netherlands cosponsored it as an

⁵¹ The delegates of the Soviet Union at the Commission indicated their displeasure, but failed to explain why they believed that this brief mention of their country was somehow beyond the special rapporteur's mandate. Indeed, the sensitivity of the Soviet authorities to this appeal by the rapporteur bodes well for his effectiveness.

⁵² UN Doc. E/CN.4/1986/15, at 30.

⁵³ *Id.* at 35.

⁵⁴ Australia, Statement to the UN Commission on Human Rights on Agenda Item 10, Mar. 12, 1986, at 4 (in the author's files).

observer. Only the Soviet Union spoke against the resolution, but its opposition was undercut by the decision at the last moment of Argentina and Senegal to add their names as cosponsors. With such broad support, the resolution was adopted on March 13, 1986 without a vote.⁵⁵

The Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief

The most significant single development at the 42d session of the Human Rights Commission was its decision in March 1986 to establish a Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief.⁵⁶ The newest special rapporteur will presumably follow the same approach as his predecessors, that is, to study the phenomenon of intolerance and discrimination based on religion or belief; to "respond effectively to credible and reliable information that comes before him and to carry out his work with discretion and independence";⁵⁷ and to report to the Commission at its next session in 1987 about his activities.

The decision to establish a Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief arose from a long history of United Nations activity on this issue⁵⁸ culminating in the proclamation by the General Assembly in 1981 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.⁵⁹ The Declaration was the product of 20 years of drafting work in the Commission on Human Rights and the very thorough Study on Discrimination in the Matter of Religious Rights and Practices, released in 1960.⁶⁰ The new special rapporteur has been asked to "examine" "incidents and governmental actions in all parts of the world which are inconsistent with the provisions of the Declaration."⁶¹

The United States was the principal sponsor of the resolution that established the Special Rapporteur on Religious Intolerance; cosponsors included

⁵⁵ UN Doc. E/CN.4/1986/L.83, adopted without a vote on Mar. 13, 1986.

⁵⁶ The Commission on Human Rights decided on Mar. 10, 1986 to adopt (with a few amendments) the resolution contained in UN Doc. E/CN.4/1986/L.45/Rev.1, which proposed the appointment of the special rapporteur. See CHR Res. 1986/20, UN Doc. E/CN.4/1986/65, at 66.

⁵⁷ UN Doc. E/CN.4/1986/L.45/Rev.1.

⁵⁸ See Clark, *The United Nations and Religious Freedom*, 11 N.Y.U. J. INT'L L. & POL. 197 (1978); S. LISKOFKY, UNITED NATIONS DRAFT DECLARATION ON THE ELIMINATION OF ALL FORMS OF RELIGIOUS INTOLERANCE (1981).

⁵⁹ GA Res. 36/55, 36 UN GAOR Supp. (No. 51) at 171-72, UN Doc. A/36/51 (1982).

⁶⁰ A. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices, UN Doc. E/CN.4/Sub.2/200/Rev.1 (1960); see also R. Clark, Background Paper for United Nations Seminar on the Encouragement of Understanding, Tolerance and Respect in Matters Relating to Religion or Belief, Geneva, Switzerland, 3-14 December 1984, UN Doc. HR/GENEVA/1984/BP.3.

⁶¹ UN Doc. E/CN.4/1986/L.45/Rev.1. The Declaration forbids discrimination on grounds of religion or beliefs; protects the right of parents to organize their family life in accordance with their religious beliefs; assures rights to worship, assemble for worship, establish religious institutions, observe religious holidays, teach religion, designate appropriate religious leaders, etc.

Belgium, Canada, Costa Rica, the Federal Republic of Germany, Italy, Norway and Senegal. In addition, the Holy See lobbied for the resolution, particularly with predominantly Catholic countries.

The United States had to overcome several impediments to getting the resolution adopted. First, since religious intolerance is very widespread, many governments might have feared that the special rapporteur would criticize their countries. The Soviet Union and its allies in particular suspected that the special rapporteur might be used to criticize them. Second, since 1983 religious intolerance had been the subject of a study by another special rapporteur under the aegis of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁶² Some delegates believed that the Sub-Commission's special rapporteur, Elizabeth Odio Benito of Costa Rica,⁶³ should complete her work before the appointment of another special rapporteur with a far broader and more active mandate.

Third, the Australian delegation and some others were concerned that problems of religious intolerance were not amenable to the relatively direct approaches used by the Special Rapporteurs on Torture and on Summary or Arbitrary Executions. Finally, some delegations were disturbed that the United States had taken this initiative without involving either Ireland or the World Council of Churches. The Irish Government had taken the responsibility in previous years for the Commission's activities in regard to religious intolerance. The World Council of Churches was somewhat upset at having been bypassed, while the Holy See had been consulted. The World Council lobbied and made a public statement⁶⁴ to the Commission raising some of the questions enumerated above, but it ultimately supported the resolution after the changes proposed by Australia were incorporated.

The U.S. delegation attacked these obstacles with a concerted lobbying effort that included appeals by U.S. embassy staffs to the foreign ministries of the governments that sit on the Human Rights Commission. There were also extensive consultations within the "Western European and Other Group" of Commission members. While the Irish delegation never became a cosponsor of the resolution, Ireland did in the end support the U.S. initiative. The U.S. delegation in Geneva also lobbied actively with all the other members of the Commission, arguing that the Declaration on Religious Intolerance provided a sufficient basis for its implementation through a special rapporteur.⁶⁵ The United States pointed out that the Odio Benito study was progressing rather slowly⁶⁶ and that its purpose was sufficiently different to permit the prompt establishment of the new special rapporteur. The United

⁶² CHR Res. 1983/40, 1983 UN ESCOR Supp. (No. 3) at 173, UN Doc. E/CN.4/1983/60.

⁶³ Sub-Comm'n on Prevention of Discrimination and Protection of Minorities Res. 1983/31, UN Doc. E/CN.4/Sub.2/1983/43, at 98.

⁶⁴ Oral intervention by Representative of the Commission of the Churches on International Affairs of the World Council of Churches to the Commission on Human Rights, February 1986 (in the author's files).

⁶⁵ Statement by Alternative United States Representative to Commission on Human Rights, Feb. 24, 1986 (in the author's files).

⁶⁶ Progress report by Elizabeth Odio Benito, UN Doc. E/CN.4/Sub.2/1985/28.

States agreed that a separate resolution should be adopted by consensus to allow Mrs. Odio Benito to complete her study during the coming year.⁶⁷ It was also agreed that the Odio Benito resolution should be adopted without a vote before the Commission considered the U.S. proposal.

On the evening of March 10, 1986, the United States introduced the resolution as principal sponsor. On the basis of consultations with Australia, the United States accepted several revisions, which were announced orally at the time of the debate. One revision added the recognition "that the problem of such intolerance and discrimination requires sensitivity in its resolution." Another significant addition indicated that the special rapporteur was "to recommend remedial measures including, as appropriate, the promotion of dialogue between communities of religion or belief and their Governments."

In a lively debate, the resolution was strongly opposed by the delegates of the German Democratic Republic and the Soviet Union. A GDR motion not to take a vote was defeated on a roll call ballot of 7 in favor, 22 against and 14 abstaining.⁶⁸ The Human Rights Commission then took a roll call vote in which 26 governments voted for the U.S. proposal. Only 5 governments opposed the resolution, including Bulgaria, Byelorussia, the German Democratic Republic, Syria and the USSR.⁶⁹ Twelve governments abstained.

While the U.S. delegation had succeeded in initiating a significant improvement in the international implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, there remained the question of who would be selected as the new special rapporteur. Both supporters and opponents of the resolution agreed that it would be very difficult to find an "individual of recognized international standing" with an appropriate religious background and nationality, and sufficient sensitivity to take action on this difficult issue. However, the experience of the Working Group on Enforced or Involuntary Disappearances and the two other theme special rapporteurs should prove to be instructive to the new special rapporteur.

Ad Hoc Improvements and Orderly Consolidation

In the interest of rationality and order in human rights implementation, one might have hoped that the Working Group on Enforced or Involuntary

⁶⁷ UN Doc. E/CN.4/1986/L.44. Since the UN Sub-Commission's 1986 session was postponed to 1987, the Odio Benito report will presumably be submitted then.

⁶⁸ The opponents of the U.S. initiative might have been more successful if they had convinced one or more Third World governments, such as Syria or Algeria, to introduce a series of crippling amendments to the U.S. resolution. For example, one amendment might have delayed the effectiveness of the special rapporteur until the completion of Mrs. Odio Benito's work. Crippling amendments could have delayed a substantive vote or undermined the basic resolution. If the opponents had tired the delegates with procedural obstructions, the Commission might have been sufficiently discouraged to accept the motion not to take a vote on the special rapporteur.

⁶⁹ Algeria and Nicaragua voted in favor of the GDR procedural resolution, but abstained on the substantive vote.

Disappearances and the three theme special rapporteurs would have been unified into a single institution rather than resting in four parallel structures.⁷⁰ Certainly, these four procedures are quite similar and their human rights concerns may overlap. For example, a "disappeared" person is quite likely to suffer torture, and may well be subjected to a summary or arbitrary execution. At least in some parts of the world, disappearances, torture and arbitrary killings arise out of religious intolerance. Nevertheless, it would have been politically impossible for these four procedures to have been delegated initially to a single special rapporteur, working group or other body; it is doubtful that they will ever be unified; and there are some good reasons against such a combination.

The Working Group on Enforced or Involuntary Disappearances and the three special rapporteurs arose out of a pressing need for international scrutiny of their respective areas of human rights concern,⁷¹ but the Commission on Human Rights initially gave them very limited authority. The four procedures have followed an identifiable pattern of slowly developing their legitimacy and thus their authority to implement human rights within their mandate. Governments have reluctantly accepted these improvements; they would probably have rejected any larger or more unified grant of authority.

Now that these four procedures do exist, it is more likely that they could be unified. Yet for years the United Nations has resisted the concept of a High Commissioner for Human Rights.⁷² There is considerable suspicion in the United Nations of any such aggregation of human rights implementation competence in a body that lacks the authority of a specific treaty. Indeed, the working group and three special rapporteurs have relatively rare international authority to take action in emergency situations to prevent or seek prompt governmental attention to disappearances, torture, summary or arbitrary killings and religious intolerance.⁷³

There are several good reasons for opposing such a unification. First, the

⁷⁰ Cf., e.g., Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AJIL 754, 771, 774-75 (1982).

⁷¹ See, e.g., Kramer & Weissbrodt, *The 1980 U.N. Commission on Human Rights and the Disappeared*, 1 HUM. RTS. Q. 18 (1981); Shestack, *The Case of the Disappeared*, HUM. RTS., No. 4, Winter 1980, at 24, 52.

⁷² See R. CLARK, A UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (1972).

⁷³ The Committee against Torture has analogous authority under Article 20 of the Convention against Torture for those governments which do not make a declaration under Article 28 to reject such authority. Convention against Torture, *supra* note 48, Arts. 20 and 28. The Committee on Human Rights and the Committee on the Elimination of Racial Discrimination have treaty-based authority to take interim measures to avoid irreparable damage. Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 34, Art. 5. Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 94, UN Doc. CERD/C/35/Rev.3, at 28 (1986). The Human Rights Committee has taken interim measures under the Optional Protocol. See, e.g., Human Rights Committee, Selected Decisions under the Optional Protocol, UN Doc. CCPR/C/OP/1, at 5-6 (1985). The Inter-American Commission on Human Rights and the UN Secretary-General have regularly undertaken urgent appeals on human rights matters. See ORGANIZATION OF AMERICAN STATES, HANDBOOK, *supra* note 35, at 130; Ramcharan, *The Good Offices of the United Nations Secretary-General in the Field of Human Rights*, 76 AJIL 130, 136-39 (1982).

success of special rapporteurs depends largely on the personal standing, intelligence and motivation of the individuals who hold that position, as well as on their ability to focus on a single issue. Second, although there is some potential overlap in the jurisdiction of the four procedures, it may not be helpful to combine them. For example, the working group has refused to concede lightly that "disappeared" persons may have died and has insisted upon governmental accountings for all disappearances. Such a position would be more difficult to maintain if the working group also had jurisdiction to pursue arbitrary killings. Third, there is some benefit in having several procedures for expressing concern—hence several channels for applying pressure—about a particular case. Fourth, although there are similarities among the four procedures, it is too soon to establish a rigid and uniform approach to such human rights violations while experimentation with ways to "respond effectively" continues. A single unified procedure would probably be given the least common denominator of authority rather than the greatest possible reach.

Conclusion

During the past half-dozen years, the UN Commission on Human Rights has initiated several innovative approaches to implementing international human rights norms. Among the most flexible and potentially effective are the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Summary or Arbitrary Executions, the Special Rapporteur on Torture and, most recently, the Special Rapporteur on Religious Intolerance. Despite their notable gains, the four procedures still have the potential for further improvement and creative interaction. Governments and nongovernmental organizations already recognize the importance of the working group and the three theme special rapporteurs in protecting against particularly grievous violations of human rights throughout the world. To improve their effectiveness, these four procedures deserve more attention, support and constructive criticism from governments, human rights activists, scholars and the media.

DAVID WEISSBRODT*

THE NEW WORLD SATELLITE ORDER: A REPORT FROM GENEVA

In a city that hosts a continuous series of international gatherings, last year's path-breaking Geneva conference on satellite communications went largely unnoticed as the news media concentrated on preparations for the Reagan-Gorbachev summit.¹ Yet for many of the 112 nations attending this

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¹ The *New York Times*, for example, devoted only one major story to the conference. Nether, *Third World Seeks Its Place In Space*, N.Y. Times, Sept. 15, 1985, §E, at 21. The absence of significant press coverage can be attributed, in part, to the ITU's self-imposed exclusion of journalists. Ironically, the world's foremost international telecommunications body is almost the only United Nations agency to maintain such a ban (the other offender is the International

6-week-long assembly, the results of the meeting—the launch of a new global satellite plan—were arguably more significant (albeit less “telegenic”) than the East-West rapprochement that followed.

The Geneva satellite congress, known as the 1985 World Administrative Radio Conference or Space WARC,² was held under the auspices of the International Telecommunication Union (ITU).³ As the specialized United Nations agency responsible for coordinating use of the world's radio spectrum and setting international telecommunications standards, the ITU plays a central role in global communications. The new world satellite plan that emerged from the conference guarantees all countries at least one satellite orbital position and an associated block of radio frequencies to meet their basic communications needs.⁴ A second conference session in 1988 is scheduled to implement the plan, which will then be revised roughly every 10 years.

Last year's Space WARC also provisionally decided to rewrite the ITU's rules, known as Radio Regulations, that spell out the procedures to be followed by countries in coordinating the radio frequencies and orbital positions used by their satellites.⁵ The revised rules will establish a new multilateral planning process to ensure that new entrants to the world's satellite club are more equitably accommodated.⁶ This process will be used by countries to access most of the satellite radio spectrum, only a modest portion of which was earmarked for the country-by-country plan.

Postal Union). Notwithstanding its oft-stated commitment to the “free flow of information” (see, e.g., SENIOR INTERAGENCY GROUP ON INTERNATIONAL COMMUNICATIONS AND INFORMATION POLICY, A WHITE PAPER ON NEW INTERNATIONAL SATELLITE SYSTEMS 5 (1985) [hereinafter cited as WHITE PAPER]), the United States has yet to challenge this ITU policy. See Coddling, *Public Access to International Organizations—The ITU*, INTERMEDIA, November 1984, at 8.

² The formal title of the conference is “World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of Space Services Utilizing It.” See INTERNATIONAL TELECOMMUNICATION UNION [hereinafter cited as ITU], FINAL ACTS OF THE WORLD ADMINISTRATIVE RADIO CONFERENCE, Res. No. 3 (1979). In ITU parlance, the first session of the conference was dubbed WARC-ORB(1) or WARC-ORB-85. In this paper, conference documents will be cited by title and number, the year 1985 being included in the ITU-ORB-85 designation.

³ The ITU is governed by the International Telecommunications Convention, which is revised approximately every 10 years by plenipotentiary conference. The current Convention [hereinafter cited as ITU Convention], adopted in October 1982 at Nairobi, Kenya, generally became effective on Jan. 1, 1984, but was not ratified by the United States until December 1985. See S. EXEC. REP. NO. 4, 99th Cong., 1st Sess. (1986). For the prior Convention, done at Málaga-Torremolinos Oct. 25, 1973, see 28 UST 2495, TIAS No. 8572.

The standard history of the ITU is G. CODDING, JR., & A. RUTKOWSKI, *THE INTERNATIONAL TELECOMMUNICATION UNION IN A CHANGING WORLD* (1982). For a capsule overview of the Union's main functions, see Robinson, *Regulating International Airwaves: The 1979 WARC*, 21 VA. J. INT'L L. 1, 6–12 (1980).

⁴ WARC-ORB-85, Report to the Second Session of the Conference, para. 3.3.4 [hereinafter cited as 1985 WARC Final Report].

⁵ ITU, Radio Regulations (1982) [hereinafter cited as ITU Radio Regulations].

⁶ 1985 WARC Final Report, note 4 *supra*, para. 3.3.5.

The new global plan adopted by the WARC nevertheless represents a marked departure from the existing legal regime. Since the early days of the space race, the United States and other countries with the technical know-how and financial resources to place communication satellites into orbit generally have had their choice of orbital positions and frequency blocks. This system of "first come, first served" (sometimes labeled "squatters' rights") has been bitterly resented by many developing countries whose satellite plans have only recently come to fruition. In its place, these countries have long argued for the kind of a priori plan tentatively approved by the 1985 WARC.⁷

Although the practical impact of the new world satellite order adopted by the WARC will not be felt until the 1990s, the potential financial stakes are enormous. Direct worldwide investment in satellite systems is estimated at over \$20 billion.⁸ Satellite communication also is a major part of the aerospace industry, one of the world's most important "high tech" or "sunrise" sectors, in which American manufacturers enjoy a strong competitive edge.

The United States itself is now served by about 25 commercial satellites,⁹ and at least 10 other countries, including Australia, Mexico, Brazil, Indonesia and India, have their own domestic satellite systems.¹⁰ A growing number of satellite parking slots also are being claimed for international service, the demand for which has been fueled by the laissez-faire initiatives of the Reagan administration.¹¹ However, the vast majority of international satellite services is now provided by the International Telecommunications Satellite Organization (INTELSAT), a 110-nation cooperative, which operates 16 satellites to provide communications through over 850 ground stations to 160 countries.¹²

The trillions of dollars in trade and services that these satellite systems make possible dwarf the hardware costs involved. Service industries, such

⁷ See, e.g., Rutkowski, *Six Ad-Hoc Two: The Third World Speaks its Mind*, SATELLITE COM., March 1980, at 22; Srirangan, *Why Orbit Planning: A View from a Third World Country—Part II*, in *NEW DIRECTIONS IN SATELLITE COMMUNICATIONS, CHALLENGES FOR NORTH AND SOUTH* (H. E. Hudson ed. 1985). For further background on the legal, political and economic origins of the WARC, see Smith, *Space WARC 1985: The Quest for Equitable Access*, 3 B.U. INT'L L.J. 229 (1985).

⁸ See Additional Technical Information relating to the Situation Prevailing in the 6/4 GHz Frequency Bands, ITU-ORB-85 Doc. 116, at 1.

⁹ See Memorandum Opinion and Order, 50 Fed. Reg. 35,228 (1985) [hereinafter cited as 1985 U.S. Orbital Assignment Plan].

¹⁰ See D. DEMAC, G. CODDING, JR., H. HUDSON & R. JAKHU, *EQUITY IN ORBIT: THE 1985 ITU SPACE WARC*, Ann. B (International Institute of Communications, 1985).

¹¹ See WHITE PAPER, *supra* note 1, and note 15 *infra*.

¹² INTELSAT REPORT 1984-1985, at 17 (1985). The treaty of Aug. 20, 1971 governing INTELSAT's activities is at 23 UST 3813, TIAS No. 7532. Separate regional satellite organizations exist for both Europe (Eutelsat) and the Arab states (Arabsat). Yet another multilateral body, the International Maritime Satellite Organization (INMARSAT) (*done* Sept. 3, 1976, 31 UST 1, TIAS No. 9605), will soon launch a series of mid-ocean satellites to provide expanded service to international shipping and airline fleets. The Soviet bloc also has an international satellite system, known as Intersputnik.

as finance, publishing, entertainment, data processing, accounting, law and advertising, which now account for a majority of the U.S. labor force, are increasingly dependent on the low-cost communications links that satellites afford. In 1985, for instance, pay-television programming distributed by satellites generated domestic revenues of almost \$4 billion.¹³ Entertainment and other U.S. service exports, again made possible largely through cheap telecommunications links, probably exceeded \$70 billion in the same period.¹⁴

The importance of the U.S. service and information industries for the American economy in the 1980s has led to a growing convergence between the Reagan administration's international communications and trade policies. On the communications side, the administration has tried to facilitate foreign commerce by expanding overseas information pipelines and seeking to preserve the status quo at last year's Space WARC.¹⁵ On the trade side, the Government has initiated bilateral discussions to open up new markets for American telecommunications products (primarily in Japan) and has also

¹³ CABLE TV INVESTOR, Sept. 24, 1985, at 4.

¹⁴ Estimating the dollar value of trade in services is notoriously difficult because the accounting categories used by the Department of Commerce are largely designed to track flows of goods. The \$70 billion figure used here is based on a 1984 estimate by the Office of the U.S. Trade Representative (USTR). See Stokes, *Beaming Jobs Overseas*, NAT'L J., July 27, 1985, at 1727. U.S. exports are directly affected by the ITU's "bread and butter" work of bringing together global telecommunications operators and equipment manufacturers to agree upon technical and operating standards. These include system interference specifications, signaling protocols and emission characteristics so that telecommunication systems around the world can operate on a relatively integrated basis.

[T]he first radiotelegraph conference at Berlin in 1903 was called to adopt standards to eliminate Marconi's restrictive agreements with the operators of its equipment. See F. C. deWolf, *International Control of Radio Communications*, Dept. of State Bulletin XII (Jan. 28, 1945) at 134. More recently, the adoption of CCIR color television standards provided a fertile forum for defining markets. See R. Crane, *The Politics of International Standards*, Ablex Publishing Corp. (1979).

Rutkowski, *History of the ITU and Current Developments*, in J. YUROW, ISSUES IN INTERNATIONAL TELECOMMUNICATIONS POLICY: A SOURCEBOOK 55, 69 n.7 (1983).

¹⁵ The Reagan administration's effort to encourage new overseas communications delivery systems has been focused on promoting competitive alternatives to INTELSAT, assertedly without compromising the organization's basic purposes. See, e.g., WHITE PAPER, *supra* note 1. The administration's policy was implemented by the FCC in Report and Order, 50 Fed. Reg. 42,266 (1985) [hereinafter cited as FCC Separate Satellite Systems Order]. But, to date, only one alternative international satellite system, Pan American Satellite Corporation, has obtained the necessary foreign correspondent. See Com. Daily, Apr. 8, 1986, at 1. For a review of the political dispute occasioned by the administration's separate systems initiative, see Staple, *The Assault on Intelsat*, NATION, Dec. 22, 1984, at 665. See also Rein, McDonald, Adams, Frank & Nielsen, *Implementation of U.S. "Free Entry" Initiative for Transatlantic Satellite Facilities, Problems and Possibilities*, 78 GEO. WASH. J. INT'L L. & ECON. 459 (1985).

The FCC also has approved several transatlantic and transpacific fiber optic cables for service in 1988-1992. See, e.g., AT&T [TAT-8], 98 F.C.C. 2d 440 (1984); Tel-Optik Ltd., 100 F.C.C. 2d 1033 (1985); Memorandum, Order and Authorization [TPC-3], FCC Mimeo No. 1794, Jan. 7, 1986. For a general overview of the FCC's recent competitive initiatives in the international arena, see Chiron & Rehberg, *Fostering Competition in International Telecommunications*, 38 FED. COM. L.J. 1 (1986).

worked unceasingly for a new round of international negotiations to reduce foreign barriers to American service exports.¹⁶

Thus, last summer in Geneva, even as the United States sought to make sure that the ITU placed as few restraints as possible on future U.S. satellite options, the administration was also engaged in an intense lobbying effort at the lake-side headquarters of the General Agreement on Tariffs and Trade (GATT). The U.S. goal was to place a new code of trade principles covering services on GATT's negotiating agenda for 1986. This trade initiative was blocked for several months by some of the key developing countries that were challenging the United States at the WARC.¹⁷ In both forums, the Third World countries feared that America's laissez-faire policies were designed to favor Western multinational companies over their own fledgling communication and service industries.

The great importance that the industrialized and developing countries each attribute to obtaining an equitable share of the emerging world service economy was underscored at the closing days of the WARC. Because of the sharp political differences over the amount of radio spectrum to be set aside for the new world satellite plan, the conference adjourned without providing the ITU's staff with adequate technical direction or funds to flesh out a draft scheme for review by the 1988 WARC.¹⁸ Unless this impasse is resolved during the intersessional period, it is quite possible that the plan will be stillborn or that its implementation will be delayed.

Failure to carry out the general mandate of the 1985 WARC,¹⁹ however, could have serious ramifications for the United States and its allies in the ITU. First, if the main satellite plan breaks down, the quid pro quo agreed to by the Third World, that only procedural changes will be made in the ITU Radio Regulations applicable to the great bulk of the satellite radio spectrum, might well be subject to renegotiation. If this happens, and especially if the failure can be attributed to the satellite powers, the ITU's continuing ability to carry out its basic frequency-coordination and standard-setting functions in other areas also could be impaired.

¹⁶ For background, see Leeson & Jacobson, *Trade in Telecommunications Equipment and Services*, in J. YUROW, *supra* note 14, at 255. On trade in services, see also Stokes, *supra* note 14, at 1730-31; on trade in telecommunications products, see COM. WEEK, Mar. 24, 1986, at 1. U.S. trade in telecommunications products, as opposed to services, has shown a deficit in recent years. In 1985 the deficit reached \$1.252 billion. *Id.* at 4.

¹⁷ On the initial GATT impasse, see Financial Times, Sept. 6, 1985, at 4. On WARC, see TELECOM. REP., Sept. 9, 1985, at 19.

¹⁸ These technical directions occupy but two pages of Directives to the IFRB, ITU-ORB-85 Doc. 356 (Rev. 1). Even so, they were the subject of considerable dispute during the waning hours of the conference. See Minutes of the 16th and 17th plenary meetings, ITU-ORB-85 Docs. 358 and 360. Only 900,000 Swiss francs were allocated to intersessional work for 1986, with just 150,000 francs included for the development of computer software to implement the allotment plan. ITU-ORB-85 Doc. 360, *supra*, at 24.

¹⁹ Simply put, the general mandate consists of a dual planning approach under which equitable access to the radio spectrum used for most GSO satellites will be guaranteed through an a priori allotment plan and the use of new multilateral planning meetings (MPMs). See 1985 WARC Final Report, *supra* note 4, para. 3.3.1.

Second, if success eludes the 1988 Space WARC, the fallout is likely to extend beyond the ITU. Owing to the large number of interested administrations, the decade-long time span of the WARC's business and its focus on a watershed technology, the conference has become a key sounding board for a host of related issues. The future of INTELSAT was paramount at the 1985 session; but foreign concern about U.S. policy in other areas, ranging from space militarization to development aid, transborder data flows and technology transfer, also bubbled to the surface. Because this complex set of issues can be expected to be implicated again at the 1988 session, its outcome will undoubtedly have ramifications outside the WARC's own agenda.

The intersessional period before the 1988 WARC consequently should be an important time for all nations with a stake in international trade and communications.

Some Preliminary Questions

To understand the context of last year's marathon meetings in Geneva, it may be useful to address two preliminary questions. First, what is the Third World's real grievance? Surely, there is still enough room in the heavens for every country to find a home for its satellites. Second, assuming, *arguendo*, that orbital crowding is a real problem, why does the present ITU regime not provide an adequate means of protecting each nation's interests? The answers to these questions are by no means straightforward. As often as not, the response depends on whom one asks.

The basic question of orbital crowding—whether real or imagined—illustrates the divergent viewpoints with which the 1985 WARC had to grapple. The satellites discussed in Geneva use a geostationary orbit (GSO) 35,800 kilometers above the equator.²⁰ The congestion problem consequently does not arise for want of physical space; the circumference of the GSO is 265,000 kilometers. Even at spacings of 2 degrees or approximately 1,500 kilometers (generally the minimum now used), the likelihood of collision is minuscule. Orbital crowding nevertheless can arise through mutually destructive radio interference between satellite systems using similar frequencies.²¹

²⁰ This orbit provides a critical parking place for communications satellites because, at this distance, satellites orbit the earth roughly once every 24 hours. They thus become stationary antennas for relaying communications between numerous ground antennas placed in the arc within which the satellite is "visible." GSO satellites can provide a variety of services including radio navigation, space research, satellite-to-home broadcasting and the provision of communications between fixed ground stations. Only this latter service, technically known as the Fixed Satellite Service (FSS) (see ITU Radio Regulations, *supra* note 5, Art. 1, §3.2), will be subject to the new regulatory regime discussed at the 1985 WARC. See also note 37 *infra*.

²¹ For a technical review of the sources of intersatellite interference and the engineering techniques that can be used to mitigate it, see ITU, Report of the CCIR [International Radio Consultative Committee] Conference Preparatory Meeting [CPM], Joint Meeting, Study Groups 1, 2, 4, 5, 7, 8, 9, 10 and 11 (1984) [hereinafter cited as CPM Report]. Much of this material is summarized in Withers, *Freedom of Access to the Radio Spectrum for Satellite Services*, TELECOM. POL'Y, June 1985, at 109.

Although no delegation at Geneva disputed this potential for interference, its practical importance was sharply contested. Since 1963, the ITU has allocated more than 40 percent of the currently usable radio spectrum (i.e., frequencies below 30 GHz²²) to satellite communications services. For various reasons, however, most communications satellite systems use only two bands: the C band, in which radio signals are sent up to the satellite at 6 GHz and back down at 4 GHz, and the Ku band, in which signals are "uplinked" to the satellite at 14 GHz and "downlinked" to earth in the 11–12 GHz band.²³

According to a 1985 advisory report to the Federal Communications Commission (FCC), in December 1984, there were about 140 satellites in the GSO including 80 communications satellites: 55 were in the C band and 15 in the Ku band, with the remainder using both bands.²⁴ The FCC report also noted that about 160 additional communications satellites (including replacements) had been proposed for launch by the ITU's members within 5 years.²⁵ The new satellites will be spread almost evenly among C, Ku and hybrid or dual-band systems. This is significant for interference purposes because satellites using the C band are "invisible" to those in the Ku band and can be collocated with them in orbit.

Strictly from an engineering viewpoint, a two- or even threefold increase in GSO satellites by the early 1990s is not necessarily cause for concern. By using different bands, divergent service areas, narrowly focused "spot" beams and steadily improved earth station technology, many engineers believe such an increase could be readily accommodated. A preconference ITU report estimated, on the basis of reasonably conservative technical parameters, that an optimal engineering arrangement would permit at least 550 satellites to be placed in the GSO (excluding ocean regions), using the C and Ku bands alone.²⁶

²² The breadth or number of frequencies within any radio band may be measured in Hertz (Hz): 1 Hertz equals 1 cycle per second. Thus, 1 Gigahertz (GHz) equals 1 billion Hz. The amount of information that can be transmitted by radio at any given moment depends directly on the breadth of the band; a telephone circuit generally requires 4,000 Hz; a television channel, 6,000,000 Hz (or 6 GHz). See, e.g., J. PIERCE, *SIGNALS—THE TELEPHONE AND BEYOND* (1981). Article 8 of the ITU Radio Regulations, *supra* note 5, contains a detailed allocation of the radio spectrum from 9 KHz to 275 GHz, on a region-by-region basis, to various radio services.

²³ In the Western Hemisphere (Region 2 in ITU parlance), the specific frequencies allocated for the FSS are 5.925–6.425 GHz uplink and 3.7–4.2 GHz downlink for the C band; 11.7–12.7 GHz downlink and 14.0–14.5 GHz uplink for the Ku band; and 17.7–21.2 GHz downlink and 27.5–31.0 GHz uplink for the Ka band. See ITU Radio Regulations, *supra* note 5, Art. 8. See also Jackson, *The Allocation of the Radio Spectrum*, *SCI. AM.*, February 1980, at 34–39. For additional background on the legal and scientific characteristics of the orbit/spectrum resource, see Rothblatt, *Satellite Communication and Spectrum Allocation*, 76 *AJIL* 56, 57–65 (1982).

²⁴ ADVISORY COMMITTEE TO THE FEDERAL COMMUNICATIONS COMMISSION ON THE 1985 SPACE WARC, SECOND REPORT 2 (1985).

²⁵ *Id.* at 4.

²⁶ See CPM Report, *supra* note 21, pt. II, at 195–202. Some of the engineering techniques upon which this projection is based are currently being implemented by the United States to enable all of its domestic satellites to provide acceptable service with 2° spacing instead of the 3° or 4° orbital separation required in the 1970s. See Report and Order, 54 *Rad. Reg. 2d* (P&F) 577 (1983) [hereinafter cited as FCC 2° Spacing Order]. See also 1985 U.S. Orbital Assignment Plan, *supra* note 9.

These technical factors led several WARC delegations, including the United Kingdom, the United States and West Germany, to maintain that the problem of congestion was essentially speculative. "[I]n no space service involving the GSO has actual usage reached such a high level as to prevent newcomers from gaining access to the orbit or to impose on them excessive obligations in terms of technical complexity or cost . . .,"²⁷ said the United Kingdom. The British therefore argued that there was no basis for making a fixed allocation of radio spectrum or orbital positions to any country before it had a satellite program under way.

The majority of the delegations believed otherwise. In a widely read position paper distributed by Colombia, the conference was advised of the following: from 1980 to 1985, the number of satellite orbital slots requested in the C and Ku bands alone more than doubled.²⁸ Moreover, Colombia noted, citing ITU records, that roughly 90 percent of the 200-odd new satellites proposed at the end of 1984 were owned by industrialized countries or international organizations they controlled; over 50 percent belonged to just nine countries.²⁹

Delegations also were aware of the growing use of the GSO by the United States and the Soviet Union. In 1979, when the ITU first called for this year's planning conference, there were but eight U.S. communications satellites in this orbit.³⁰ There are now about 25 and, in July 1985, the FCC gave the go-ahead for approximately 20 more, including at least 2 new private transatlantic systems.³¹

Although all the American satellites must operate at an orbital spacing of just 2 degrees, by 1990 U.S. domestic satellites will encircle almost one-quarter of the globe—from longitude 62° west to 146° west (i.e., from Hawaii to Bermuda). A further 15° arc over the Atlantic might be required by new private international systems, which under the Reagan administration's new policy may compete with INTELSAT and other multi-adminis-

²⁷ Proposals for the Work of the Conference, ITU-ORB-85 Doc. 18, at 2. The British also noted that a 1984 ITU survey disclosed that only a few countries (India, France and Mexico) had acknowledged difficulty in coordinating new satellite systems with existing users. *Id.* This survey was distributed at the 1985 WARC as Ann. F to Note by the Secretary-General, ITU-ORB-85 Doc. 4.

²⁸ Statistics relating to the Occupancy of the Geostationary Orbit (GO) by Bands and Frequencies, ITU-ORB-85 Doc. 65, at 2.

²⁹ *Id.* at 4.

³⁰ See Orbit Assignment Order, 84 F.C.C. 2d 584 (1981).

³¹ The initial U.S. domestic communications satellites were placed into the GSO shortly after the FCC's landmark "open skies" decision in 1972 to permit private companies to operate satellites on a competitive basis. See Domestic Satellite Communications, 35 F.C.C. 2d 844 (1972). The first generation of satellites was owned by RCA, Western Union and the Communications Satellite Corp. (Comsat), a quasi-public company established by Congress to serve as the U.S. representative to INTELSAT. See 47 U.S.C. §701 *et seq.* (1982 and Supp. 1985). The FCC's most recent orbital assignment plan, announced barely 2 weeks before the opening of the 1985 WARC, awarded approximately 25 "domestic" satellite slots to 11 different companies. See 1985 U.S. Orbital Assignment Plan, *supra* note 9. The FCC simultaneously approved, in principle, applications for several international satellite systems. See FCC Separate Satellite Systems Order, *supra* note 15.

tration satellite systems.³² This widening U.S. orbital arc is still considerably less than that occupied by the Soviet Union, whose satellites provide service from the Pacific to the Caribbean.³³

In sum, notwithstanding the past ability of the ITU's members to gain access to the GSO, although often at a higher economic cost to latecomers, there was a fairly common perception at Geneva that, absent a new ITU guarantee, this would not be true in the future. And, as is often the case with politically charged questions, perceptions rather than facts were controlling.

The divergent perceptions held by the over nine hundred delegates in Geneva seemed even greater when the discussion turned to the second preliminary question mentioned above: the adequacy of the legal regime under which countries now obtain access to the GSO. Because a satellite occupies a physical location in space, quite apart from its use of radio frequencies, two different sets of legal principles are involved: those governing the law of space and those controlling the use of the radio spectrum.

Neither legal regime provides any readily enforceable property rights for the owners of communications satellites. Despite the claims of certain equatorial countries to the GSO arcing over their territories, under the Outer Space Treaty of 1967, which has been ratified by 80 countries, the GSO is a part of "outer space" and thus is "the province of all mankind."³⁴ The Treaty also provides that "outer space" shall be free for exploration and use by all states.³⁵ Hence, while the GSO may not be appropriated by any nation, it may be used by all that have the means to do so. No international agency accordingly has been legally charged with policing satellite orbital slots per se.

The ITU does have jurisdiction, however, over the radio frequencies that are used to transmit information to and from communications satellites in the GSO.³⁶ Here lies the rub; from a practical standpoint, the problem of coordinating the efficient use of these radio frequencies cannot be separated from the task of assigning orbital locations to each satellite. The conundrum for the ITU has always been how to go about carrying out these related tasks.

Until now, the ITU's members, with one notable exception, have stayed clear of adopting any kind of a priori plan for assigning fixed positions or specific radio frequencies to given satellites in the GSO. This exception applies to so-called direct broadcast satellites; here, three regional plans focus the satellite beams of each nation on its own territory.³⁷ Otherwise, in keeping with the evolutionary nature of the space race (since the 1957 launch of

³² See note 15 *supra*.

³³ See Ann. B to the IIC study, note 10 *supra*.

³⁴ Art. I, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 205 (entered into force for the United States Oct. 10, 1967) [hereinafter cited as Outer Space Treaty of 1967].

³⁵ *Id.*

³⁶ ITU Convention, *supra* note 3, Art. 4.

³⁷ The 1983 Broadcast-Satellite Service (BSS) plan for ITU Region 2 was ratified at the 1985 WARC and appears in the Final Acts of the 1985 WARC. For a review of the events

Sputnik, nations placing objects into earth orbit generally have not asked any other country's permission), a set of administrative regulations has been used to permit satellite orbits and frequencies to be coordinated with all potentially affected ITU members on a more or less first come, first served basis.

These Radio Regulations fill hundreds of closely written pages and are administered by the ITU's International Frequency Registration Board (IFRB).³⁸ They place the primary burden of coordinating a new satellite system in practice, if not in law, on the would-be entrant.³⁹ The IFRB has managed to accommodate all new entrants to date. But the cost of completing the coordination process, both in administrative terms and in terms of satellite design, can be very burdensome to the newcomer. Indeed, the burdens that this process placed on India's first domestic satellite (which had to accommodate INTELSAT's earlier system) in large measure triggered the call for a new ITU order.⁴⁰

The questionable enforceability of the present ITU rules has also worried the developing countries. At root, the present coordination process depends on the good will of participating administrations. Sanctions for violation are uncertain and rarely applied.⁴¹ In 1983, for example, a minor diplomatic stir was caused when Cuba advised the IFRB that it intended to place a satellite at a location occupied since June 1983 by an RCA satellite used to

leading up to the Region 2 plan, see Du Charmé, Irwin & Zeitoun, *Direct Broadcasting by Satellite, the Development of the International Technical and Administrative Regulatory Regime*, 9 ANNALS AIR & SPACE L. 267 (1984). BSS plans for Regions 1 (Europe, Africa, the USSR) and 3 (Asia and Oceania) had been adopted earlier. See ITU, Final Acts of the World Administrative Radio Conference for the Broadcasting Satellite Service in the Frequency Bands 11.7–12.2 GHz in Regions 2 and 3 and 11.7–12.5 GHz in Region 1 (1977).

³⁸ See ITU Convention, *supra* note 3, Art. 10.

Operationally, [the IFRB] is the key staff organ of the ITU. [It] consists of five members elected at plenipotentiary conferences. The IFRB maintains the international list of frequency assignments and, in the case of geostationary satellites, orbit positions. . . . Each frequency and orbit assignment notified to the IFRB by ITU members must be examined for conformity to the ITU regulations—for example, whether the assignment is in accordance with the international table of frequency allocations and whether it is compatible with other registered assignments.

Robinson, *supra* note 3, at 8–9.

³⁹ See generally C. CHRISTOL, *THE MODERN INTERNATIONAL LAW OF OUTER SPACE* 555–68 (1982). See also Rothblatt, *supra* note 23, at 60; Smith, *supra* note 7, at 234 n.16.

⁴⁰ See Rutkowski, note 7 *supra*. Most of the difficulties faced by India arose from its obligation as an INTELSAT member to adhere to the coordination requirements established by Article XIV of the organization's charter, not the ITU regulations. See Doyle, *Regulating the Geostationary Orbit: The ITU's WARC-ORB-85*, at 5 (Paper presented at ABA Forum Comm. on Air & Space Law, Oct. 11, 1986). At the time, these requirements were somewhat stricter than the ITU's own guidelines. See Levy, *Institutional Perspectives: The ITU Common User Satellite System and Beyond*, 16 CASE W. RES. J. INT'L L. 171, 194–95 (1984).

⁴¹ In the words of one observer: "If the [IFRB] can be compared to a traffic officer, it is an officer unable to adequately measure the traffic, whose 'tickets' for violations are often ignored, and who lacks not only a jail but also a court for the offenders." D. LEIVE, *INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE RADIO SPECTRUM* 22 n.8 (1970).

distribute cable television programming.⁴² The United States admittedly had failed to complete the ITU coordination necessary to give the satellite full legal protection under the Radio Regulations. Although the United States soon notified the IFRB that it had rectified the omission, the incident suggested that growing commercial pressure might be leading the United States to launch first and coordinate later, if at all.⁴³

Whatever the case, the ITU's police powers are limited. It is not a supranational FCC. In addition, although provisions for the mediation or arbitration of interference disputes are written into the ITU's governing Convention,⁴⁴ apparently none have ever been invoked. The competence of the International Court of Justice to resolve ITU disputes also is untested.

These factors led the majority of the delegates in Geneva to perceive the existing system as unfair or, at best, of uncertain value in protecting their interests. As Iraq told the conference, "We do not know whether the present radio regulations have worked or not. We have not had an occasion to use them. But the principle underlying them—first come, first served—is unacceptable. That is the issue for us."⁴⁵

The Politics of Planning

To replace the present regime, the nonaligned states, led by India, Algeria, Kenya and China, since 1979 have made it plain that an a priori allotment plan should be drawn up for the major frequency bands used for geostationary communications satellites.⁴⁶ The Soviet Union also has supported this approach.⁴⁷

⁴² BROADCASTING, Aug. 29, 1983, at 113.

⁴³ *Broadcasting* stated that, as of 1983, "it appeared" that the United States had completed the ITU notification process before launching "in no more than a few instances." *Id.* The ITU's rules have required advance coordination of GSO satellites since 1963 and advance publication and coordination of system specifications since 1971. *See generally* C. CHRISTOL, *supra* note 39, at 557-68. However, the United States did not adopt formal rules to ensure that commercial satellite applicants supplied the FCC with adequate information to comply with these treaty obligations until 1983. *See* FCC 2^o Spacing Order, *supra* note 26, and 47 C.F.R. §25.202 (1985). The procedures that the FCC and other government agencies are required to follow in notifying U.S. satellites to the ITU are detailed in FCC & DEP'T OF COMMERCE, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, MANUAL OF INSTRUCTIONS FOR NOTIFYING U.S. RADIO FREQUENCY ASSIGNMENT DATA TO THE INTERNATIONAL FREQUENCY REGISTRATION BOARD (1984).

⁴⁴ ITU Convention, *supra* note 3, Arts. 50, 80 and Optional Additional Protocol.

⁴⁵ This statement is based on the author's notes of the proceedings of Committee 5A, Aug. 12, 1985. No official minutes of this meeting were taken.

⁴⁶ *See* Rutkowski, *supra* note 7.

⁴⁷ *See, e.g.,* Proposals for the Work of the Conference, ITU-ORB-85 Doc. 9. Despite the USSR's preconference support for a priori planning, as a major satellite power and as one of the principal beneficiaries of the existing first come, first served regime, the Soviet Union tended to side with the United States and its European allies where planning proposals threatened to compromise its sovereignty or to implicate national security considerations. The Soviet Union's mid-conference proposal, limiting a priori planning to the C and Ku expansion bands (*see* Agenda Items 2.2 and 2.3, ITU-ORB-85 Doc. 189), thus distinguished it from many developing nations.

At a month-long preconference meeting in 1984 attended by 60 countries, however, significant differences developed as to what the plan should contain. How much radio spectrum should be allocated to it? From what frequency bands should the spectrum be chosen? Should existing systems be "grandfathered"? Did major international satellite systems, such as INTELSAT and Intersputnik, deserve a preferred status? How often should the plan be revised?⁴⁸

At the same 1984 meeting, a rather smaller bloc of Western countries maintained that an allotment plan, especially in those bands now subject to heavy use, was unacceptable. Instead, equitable access should be guaranteed by convening periodic multilateral meetings among all prospective users of the GSO. These meetings would replace the lengthy step-by-step bilateral coordination process that new members of the satellite club must now complete with any prior members that might be adversely affected.⁴⁹

As the 1985 conference drew near, the United States delegation, led by Ambassador Dean Burch, sought to advance a compromise. If the WARC eschewed an a priori plan and adopted the type of administrative reforms advanced by the Americans, then the United States would announce a 15-year moratorium on the use of a 600-MHz block of spectrum in the C band for its domestic satellites and would urge other industrialized countries to do the same.⁵⁰

This block of radio frequencies, known as an "expansion band," had been set aside by the ITU in 1979, primarily to satisfy INTELSAT's expected needs. A similar frequency block adjacent to the Ku band also had been added to the satellite services that year. But, to date, these expansion bands house no operational satellites.⁵¹

Although the United States believed that its "package deal" represented a fair means of guaranteeing orbital access to the developing countries without penalizing existing users, the proposal attracted little support.⁵² The

Compare, e.g., Algeria et al., *Proposals for the Work of the Conference*, ITU-ORB-85 Doc. 146; India, *Proposals for the Work of the Conference*, ITU-ORB-85 Doc. 54.

According to the United States, "The primary concern of the Soviet Union was to protect their existing systems while appearing to support developing countries." DEP'T OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE FIRST SESSION OF THE ITU WORLD ADMINISTRATIVE RADIO CONFERENCE ON THE PLANNING OF THE GEOSTATIONARY SATELLITE ORBIT AND THE SPACE SERVICES UTILIZING IT 45 (1985) [hereinafter cited as U.S. WARC DELEGATION REPORT]. See also note 92 *infra*.

⁴⁸ See generally CPM Report, pt. I, *supra* note 21.

⁴⁹ The U.S. proposal for multilateral planning meetings is fleshed out in Additional Proposals on a Multilateral Planning Meeting, ITU-ORB-85 Doc. 107.

⁵⁰ See Additional Proposals to WARC-ORB(1) regarding Agenda Item 2, ITU-ORB-85 Doc. 30. The proposal for a C-band moratorium represented an evolution from the initial public bargaining position of the United States. *Compare* Proposals for the Work of the Conference, ITU-ORB-85 Doc. 5, with the FCC's recommendation to the Department of State, App. B-1 to First Report and Order, 100 F.C.C. 2d 976 (1985).

⁵¹ See Report by the IFRB to the WARC-ORB(1) on the Situation in the Expanded Parts of the Bands 4/6 and 11-12/14 GHz, ITU-ORB-85 Doc. 275.

⁵² See, e.g., Smith, *Space WARC 1985—Round One Ends*, AIR & SPACE LAW., Summer/Fall 1985, at 17.

majority of delegations had come prepared, as China put it, "to break the old order of first come—first served," not to adopt "Western procedural reforms."⁵³ Thus, despite the historical tradition of consensus at ITU conferences, it was apparent that delegations would vote their sentiments on this issue if it came to that.

At the same time, there was reason for the reformers to be cautious. The ITU Convention grants every country the privilege of reserving its rights on any particular matter; that is, not to be bound by a conference decision.⁵⁴ Hence, the adoption of a rigid a priori plan over the objection of the Western bloc would yield only a paper victory. Both sides thus sought to hold out as long as the 6-week conference schedule allowed, hoping that the importance of the issues at hand would force a compromise rather than no agreement at all. But all were acutely aware that delay favored those countries most comfortable with the status quo.⁵⁵

The Politics of Procedure

With delay a strategic weapon, one of the first hurdles the developing countries faced was the conference's unwieldy organization. The key agenda items, fixed since 1983 by the ITU's governing council, were divided among two committees and a half dozen subcommittees or working groups.⁵⁶ In theory, this division would permit each of the two rather different professional groups at the WARC, the policy experts and the communications engineers, to make a contribution. The first would draft the planning "principles" for equitable access; the latter would work out the technical means for doing so. In practice, the WARC had its own logic. Because of the deep differences over the ground rules on which any new ITU regime should be based, after 3 weeks, the "principles" committee was still debating procedural issues. The technical committee was thus forced to seek its own solutions for coordinating satellite systems regardless of the planning regime that might ultimately be adopted.

One of the most contentious issues faced by the "principles" committee was the territorial claims asserted by several equatorial countries to that segment of the GSO superjacent to their borders. Since its announcement in the 1976 Bogotá Declaration, this equatorial rights doctrine has generated

⁵³ Based on the author's notes of the proceedings of Committee 5A, Aug. 16, 1985. No official minutes of this meeting were taken.

⁵⁴ ITU Convention, *supra* note 3, Art. 77, paras. 581 and 582. A country may also decline to ratify an ITU agreement with which it disagrees.

⁵⁵ In these circumstances, some observers found it hard to credit the U.S. strong show of displeasure over the alleged "filibuster" by developing countries in the WARC's final weeks. For example, the Director of the Department of State's Bureau of International Communications and Information Policy later stated that the conference's work "was, in effect, held hostage by a handful of delegates who seemed prepared to jeopardize the interest of the majority in pursuit of their own narrow ideological goals." BROADCASTING, Nov. 4, 1985, at 71. See also TELECOM. REP., Sept. 9, 1985, at 20.

⁵⁶ See Structure of the First Session of the WARC, ITU-ORB-85 Doc. 79.

much debate but gained little political support.⁵⁷ Most countries believe that the doctrine runs counter to the principles of the 1967 Outer Space Treaty, which preserves the GSO for use by all countries.⁵⁸ Moreover, while the declaration has made many developing countries aware of the potential value of the GSO, it has also fragmented them politically. At Geneva, for example, equatorial rights did not even win the active support of the two equatorial countries (Indonesia and Brazil) with geostationary satellites.

The WARC finally disposed of the equatorial rights issue on technical grounds (ruling that it was not part of the agenda),⁵⁹ but not before it had generated a particularly acerbic exchange between the United States and Colombia. In 1983, Colombia alleged, the United States peremptorily launched a satellite used for distributing cable television programming into the GSO at longitude 74° west (almost directly "over" Bogotá) without completing the ITU coordination process. This U.S. action, said Colombia, "constituted a serious failure to fulfill the obligation imposed by the [ITU] Convention, which has the force of law for all parties."⁶⁰ To behave as if "might is right," Colombia said, was "an invitation to Star Wars."⁶¹

The United States had no choice but to proceed as it did, said Ambassador Burch. Despite U.S. completion of the necessary technical coordination in 1982, Colombia would not assent to the coordination unless the United States recognized Colombia's sovereignty over its portion of the GSO. "We refused," said Burch, "because we and nearly every other country . . . have refused to recognize sovereign claims to the GSO."⁶²

Whither INTELSAT?

A second major issue that preoccupied the "principles" committee was the concern of more than 50 delegations to protect the future of "multi-

⁵⁷ See, e.g., Smith, *supra* note 7, at 243 n.70. The Bogotá Declaration is reprinted in C. CHRISTOL, *supra* note 39, at 891.

⁵⁸ Outer Space Treaty of 1967, *supra* note 34, Art. I. See also Gorove, *The Geostationary Orbit: Issues of Law and Policy*, 73 AJIL 444 (1979).

⁵⁹ See Note by the Secretary-General, ITU-ORB-85 Doc. 355.

⁶⁰ The record of the U.S.-Colombian exchange is based on the author's notes. See also Minutes of the 5th plenary meeting, ITU-ORB-85 Doc. 263, at 5-7. Colombia also challenged the legality of the U.S. action in changing by 10° the announced position of another cable television satellite. See *id.* and Minutes of the 16th plenary meeting, *supra* note 18, at 16-18.

Curiously, neither Colombia nor Cuba, which generally supported Colombia's position at the 1985 WARC, sought to reopen the controversy raised by Cuba's 1983 IFRB filing (see text at note 42 *supra*), though an ITU background report distributed to the conference appeared to confirm that, in several cases, the United States had been lax in coordinating its satellites before bringing them into service. See Note by the Secretary-General, ITU-ORB-85 Doc. 105, Ann. 1. For example, according to the IFRB's information, the United States brought into use two satellites owned by Satellite Business Systems (US SAT 6A and 6C) before even completing the first step (advance publication) of the required ITU coordination process. The annex also purportedly shows that several other U.S. satellites were launched before coordination had been completed. The accuracy of the IFRB's data, however, has been questioned by FCC sources familiar with the coordination of U.S. satellites.

⁶¹ Based on the author's notes; see note 60 *supra*.

⁶² Minutes of the 5th plenary meeting, *supra* note 60, at 7.

administration systems" like INTELSAT and Intersputnik. These systems today are the heart of the world's international satellite network. INTELSAT alone carries over two-thirds of the world's telephone traffic and virtually all international television signals.⁶³ Yet, even though a majority of the ITU's members are dependent on multi-administration systems for access to the GSO, the ITU Convention does not give these organizations any formal say in the ITU's deliberations. There was thus a real danger in Geneva that the special needs of INTELSAT et al., whose multinational missions limit them to a narrow range of orbital positions, would be subordinated to the national interests of the strongest satellite powers.⁶⁴

To forestall this eventuality, fairly early in the conference Switzerland took the lead in crafting a resolution to protect the future interests of INTELSAT et al.⁶⁵ This effort immediately ran into heavy opposition. The United States, the Soviet Union, India and Brazil all asserted that the ITU Convention protected the sovereign right of each nation to determine whether national or international systems should have precedence. The United States also objected to any resolution that would discriminate among different international satellite systems, to the prejudice of the Reagan administration's new laissez-faire policy for international satellite systems. Ultimately, despite repeated revision and debate (the WARC probably spent more time on this issue than any other), the Swiss proposal failed to gain a consensus.⁶⁶

Toward a Compromise

After almost 4 weeks of deadlock on the key issues before the conference and in the face of mounting protest from the nonaligned group, Chairman Iliya Stajanovic, an engineering professor from Yugoslavia, tried to take charge. "Failure to find a solution," Dr. Stajanovic said, "might prove fatal to the further activities of the ITU which are so important to the world's business."⁶⁷ Dr. Stajanovic announced that a representative ad hoc group of 20 nations therefore had been formed "to seek for a consensus solution for planning."⁶⁸

Following several days of closed-door meetings, during which almost all other work ceased, the ad hoc group issued a report.⁶⁹ It stated the obvious: to win a consensus, any new access regime must be based on a two-part approach. One part would involve an allotment plan to reserve one or more

⁶³ INTELSAT REPORT, note 12 *supra*, at 1.

⁶⁴ See Dizard, *Space WARC and the Role of International Satellite Networks* (Center for Strategic and International Studies, Georgetown University, 1984). See also Levy, *supra* note 40.

⁶⁵ See Planning Principles, ITU-ORB-85 Doc. 216; see also Consideration on the Requirements of the International Multilateral Intergovernmental Organizations, ITU-ORB-85 Doc. 166.

⁶⁶ See First Report of Committee to Plenary Meeting, ITU-ORB-85 Doc. 324.

⁶⁷ Dr. Stajanovic's statements are based on the author's notes of the Sept. 2, 1985 session of Committee 5. An abbreviated account is provided in ITU-ORB-85 Doc. 220.

⁶⁸ ITU-ORB-85 Doc. 220, *supra* note 67, at 2.

⁶⁹ Document from the Chairman of Working Group 5A, Organization of Work, ITU-ORB-85 Doc. DT/70 (Rev. 1), Ann. 3.

orbital positions and frequency blocks for the use of each country. The other would make use of modified regulatory procedures, incorporating the kind of multilateral planning meetings (MPMs) advanced by the United States. The ad hoc group remained divided over the crucial question of how much spectrum should be given over to the allotment plan and in what frequency bands. There was likewise no agreement on how multi-administration systems should be treated under this dual approach.

Which frequency bands would be subject to an allotment plan soon became the key question. The willingness of the United States and other Western countries to accept any kind of allotment plan, which, by definition, would limit each country's orbital options, depended on the breadth and identity of the frequency bands to which the plan would apply. Conversely, the willingness of many nonaligned countries to accept the administrative reforms (i.e., the MPMs) proposed by the Western bloc appeared to hinge, in large measure, on the allocation of a substantial portion of the most desirable bands to an a priori plan.

The United States, in particular, argued that the 600 MHz block in the 4/6 GHz expansion band—the band in which the United States had proposed a moratorium—was enough to meet each country's basic satellite communications needs. It estimated that 600 MHz (300 MHz to uplink communications and 300 MHz for transmissions to earth) would allow each country at least one satellite capable of carrying up to 50,000 telephone circuits or up to 30 television channels.⁷⁰ But many countries believed that this spectrum would be inadequate. They argued for an additional 1,000 MHz in the 11–12/14 GHz expansion band.⁷¹ Another group of countries, for which Algeria's Noureddine Bouhired often spoke, held out for an allotment plan in other bands already subject to significant use (in part, for military communications systems) by both the United States and the USSR.⁷²

Once again the "principles" committee was asked to strike an acceptable balance between the spectrum to be reserved for a new satellite allotment plan and that to be subject to improved access procedures. Delegates from 59 countries addressed the issue. Roughly 60 percent of the speakers supported the use of both the 4/6 GHz and the 11–12/14 GHz expansion bands for an allotment plan.⁷³ While this plurality fell something short of consensus, it was quickly adopted as one by the committee as it rushed to complete its work.

The work of the "principles" committee was presented to the conference plenary on September 12, less than 36 hours before the WARC's scheduled adjournment until 1988. At this late stage, it was obvious that even if the plenary were extended through the weekend (the conference hall was booked

⁷⁰ See ITU-ORB-85 Doc. 116, *supra* note 8, at 2.

⁷¹ See, e.g., ITU-ORB-85 Doc. 189, *supra* note 47.

⁷² See, e.g., ITU-ORB-85 Docs. 54 and 146, *supra* note 47.

⁷³ See Summary Record of the Eighth Meeting of Committee 5, ITU-ORB-85 Doc. 293. Twenty nations including the United States reserved their position regarding this compromise. See First Report of Committee 5 to Plenary Meeting, ITU-ORB-85 Doc. 324. See also Minutes of the 10th and 11th plenary meetings, ITU-ORB-85 Docs. 339 and 341.

for other meetings thereafter), only the broad outlines of a new satellite order would emerge.

The Final Days

Meeting almost continuously for 4 grueling days, with the seemingly indefatigable support of the ITU's Secretary-General, Richard Butler, the plenary began its agenda. The frequency bands to be used for the allotment plan were the first order of business. With considerable behind-the-scenes arm twisting, but to the visible relief of most delegations, Chairman Stajanovic persuaded the plenary to ratify the "consensus" reached in the "principles" committee. (To allay the dissatisfaction this caused some delegations, the plenary also asked the ITU's technical groups to review the feasibility of a future allotment plan in the Ka band.⁷⁴)

Next, the plenary turned to the prickly issue of multi-administration systems. The conference was aware that these systems were unlikely to be accommodated by the a priori plan because the plan would make allotments only for national or subregional systems.⁷⁵ A clear majority felt it essential, therefore, that INTELSAT and other such systems be given due consideration under the new coordination procedures.

The Swiss again advanced a compromise: the new procedures would "take into account the requirements" of multi-administration systems used collectively, but without "affecting the rights of national systems."⁷⁶ The term "national systems" was understood by most delegations, as Algeria explained, to mean systems providing domestic rather than international services.⁷⁷ However, the language was sufficiently broad to permit the United States to claim later that it covered any system authorized by an ITU nation.⁷⁸

⁷⁴ See 1985 WARC Final Report, *supra* note 4, para. 3.3.1(b). The bands to be studied are: 18.10–18.30 GHz; 18.30–20.20 GHz and 27.00–30.00 GHz. A report is to be made to the 1988 WARC "with the view of taking a decision on the future plan of these bands by a future competent conference." *Id.*

⁷⁵ *Id.*, para. 3.3.4.1. Multi-administration systems may still benefit from the allotment plan to the extent administrations are able to pool or combine allotments. Notably, paragraph 3.3.2 of the Final Report provides that "[b]oth parts of the planning method [the allotment plan and the improved procedures] will need to conform to the planning principles contained in [paragraph] 3.2." These principles include "tak[ing] into account the requirements of administrations using multi-administration systems." *Id.*, para. 3.2.6(a). See note 77 *infra*.

⁷⁶ *Id.*, para. 3.2.6(a).

⁷⁷ The plenary debate over the compromise language regarding multi-administration systems is reported in Minutes of the 12th plenary meeting, ITU-ORB-85 Doc. 342, at 2–3. For the U.S. interpretation, see Statements relating to the Report, ITU-ORB-85 Doc. 361, at 6. See also U.S. WARC DELEGATION REPORT, *supra* note 47, at 56–57.

⁷⁸ The controversy over the appropriate construction of "the rights of national systems" is a continuing one. See, e.g., the FCC's post-WARC discussion of the competition for transatlantic satellite slots in its Separate Satellite System Order, *on reconsideration*, FCC 86-144, ¶¶44-56 (Apr. 17, 1986). However, the reaction that the administration's "separate systems policy" has engendered seems disproportionate to the policy's near-term economic impact on INTELSAT. In contrast, the Government's 1985 decision to permit AT & T and other overseas carriers to reduce their use of Atlantic region satellite circuits in favor of cable circuits may cost INTELSAT \$40–50 million for the 1986–1991 period. See North Atlantic Region Facilities Planning Order, 50 Fed. Reg. 34,813, 34,822–23 (1985).

Private international satellite systems incorporated in the United States and authorized by the FCC would thus be on an equal footing with INTELSAT et al.

Which interpretation of this compromise ultimately prevails will likely depend on how the resolution is implemented. If INTELSAT and a country request the same orbital slot, which must defer? While the question probably will remain unanswered until at least 1988, this year's debate did produce a fairly clear policy consensus among the 112 nations at the WARC: multi-administration satellite systems must continue to be accommodated. While the United States (or another country) is free to implement a more laissez-faire communications regime at home, these policies should not be extended overseas at the expense of INTELSAT and its sister organizations.

On Sunday morning, September 15, with more delegations leaving Geneva by the hour, the plenary began work on the critical task of instructing the ITU's technical staff on just how the allotment plan—the centerpiece of almost 6 weeks of debate—should be drawn up. Most agreed that the ITU would require extensive computer facilities; the complexity of allocating at least one orbital position and frequency block to provide equivalent coverage to countries as divergent geographically as the Soviet Union and San Marino was obvious. It was also agreed that a precise set of technical parameters (e.g., how much leeway a country would have to shift its satellite within an assigned arc) was essential to prepare a viable plan. No worldwide plan for multipurpose (nonhomogeneous) satellites had ever been drawn up before and the regional broadcast satellite plans had shown that the technical problems were by no means trivial.⁷⁹

Late Sunday afternoon, France, which, prior to the conference had experimented with several computerized planning approaches, addressed the plenary. On the basis of its experience, France unequivocally advised that no allotment plan was possible unless each country was assigned a nominally viable orbital arc for its satellite instead of a fixed position.⁸⁰ France acknowledged that arc planning rather than point planning was unacceptable to many developing countries. Algeria and Kenya argued, for example, that arc planning would strip away the very guarantee—one orbital position per country—that the plan sought to achieve. But France was adamant and, seconded by the United States, called for a vote.⁸¹

After a brief coffee break, the ITU's Secretary-General confirmed what many had feared all day. The conference no longer had a quorum. Only 49

⁷⁹ It bears noting that "[a]fter nearly ten years the ITU's 1977 Broadcasting-Satellite [Service, BSS] Plan [for ITU Regions 1 and 3] has yet to see a single satellite put into use under it, and is likely to be used for a few systems at best. The technology has simply far outstripped the assumptions imbedded in the plan." Rutkowski, *Space WARC: The Stake of Developing Countries*, SPACE POL'Y, August 1985, at 240. See also Smith, *supra* note 7, at 248–49. Moreover, planning for the FSS is far more complicated than for the BSS because technical parameters, operational standards and services in the FSS generally are not homogeneous. See 1985 WARC Final Report, *supra* note 4, para. 3.4.2.4.

⁸⁰ The French position is outlined in Proposals, and Predetermined Arc Allotment Plan, ITU-ORB-85 Docs. 217 and 347, respectively.

⁸¹ See ITU-ORB-85, Minutes of the 17th plenary meeting, *supra* note 18, at 18.

of the 100 delegations entitled to vote remained.⁸² Although the remaining delegates agreed to continue reviewing the report of the "principles" committee, it was clear that any further actions of the conference would be of extremely questionable legal effect.⁸³ The 1985 WARC had exhausted its mandate.

Conclusions

After a highly political international conference like the Space WARC, which had been the subject of intensive preparations for half a decade, one of the inevitable questions is, "Who won?" Again, there is no easy answer.

This was a conference that the United States and many of its allies did not want and from the outset had worked hard to prevent.⁸⁴ While supportive, in principle, of equitable access to the GSO, the United States feared that the a priori allotment of orbital slots and frequencies would stifle the growth of its satellite industry, badly cramp its orbital options and lead to the grossly inefficient use of an ever more valuable resource. Because these views were not shared by the majority of the ITU's members, the unwritten premise of U.S. strategy always had been how best to reduce the possible scope of an allotment plan and to limit its potential damage to American interests.

From this perspective, the decision to establish an allotment plan in two essentially unused frequency bands, one of which the United States had volunteered for a temporary moratorium, cannot be viewed as much of a setback. The bulk of the usable satellite spectrum will continue to be subject to the existing first come, first served regime or, provided the 1988 session can agree on the particulars, to a variant of the multilateral planning procedure advanced by the United States.⁸⁵

⁸² *Id.*

⁸³ The U.S. WARC DELEGATION REPORT, *supra* note 47, at 89, provides the following assessment of the events surrounding the Secretary-General's announcement that the absence of a quorum precluded any further decisions from being taken by a vote:

1. The SG knew that a quorum was not present and did not want to have a vote that could later be called into question. . . .

2. No delegation wanted to be viewed as responsible for causing the conference to be a failure and thus none was willing to push the debate on the quorum issue. The key questions on planning approaches and frequency bands to be planned and even many of the underlying principles had not yet been formally agreed in Plenary. If the quorum issue had been pushed, they would remain unagreed and thus there would be a 'failure.'

3. . . . [I]t was finally tacitly agreed that inasmuch as the output of the first session was a "Chairman's Report" (and not Final Acts) to the second session, that report could reflect the discussion of the closing hours of the conference, could express the varying views of the delegates, and could thus leave the question of legal authenticity of the decisions in limbo.

⁸⁴ The U.S. WARC DELEGATION REPORT, *supra* note 47, at 2, states that a principal U.S. objective was "to avoid the imposition of any planning of the kind known as *a priori*." See also Robinson, *supra* note 3, at 27-28.

⁸⁵ The 1985 WARC Final Report, *supra* note 4, para. 3.3.1(b), provides that the MPM shall be applied in the C band at 3.7-4.2 GHz and 5.850-6.425 GHz; in the Ku band at 10.95-

Furthermore, the proposed allotment plan would not adversely affect current U.S. satellite services. Nor would the revised access rules cover the critical frequency bands now used by the United States for military communication services: the 3.4–3.7 GHz band, used by defense radars such as AWACs, and the 7–8 GHz band, used by the armed forces satellite communications systems.⁸⁶ Thus, as Ambassador Burch said at a postconference meeting in Washington, D.C.: “We came home with our honor and our resources intact.”⁸⁷

At the same time, it would be a mistake to minimize the decisive break with the status quo that the allotment plan heralds. For the first time, all countries of the world, regardless of their wealth or current technological capability, will have a firm assurance that at least one satellite orbital position is available for them. This is no small diplomatic accomplishment.

Nevertheless, the fractious and inconclusive final hours of the WARC underscored the serious practical problems that must be resolved if a viable allotment plan is to be implemented in 1988. Even if operational guidelines for a draft plan can be worked up by the ITU’s technical staff, the resources for testing it are woefully inadequate. Under very strict budget guidelines imposed on the ITU by Western countries at a 1982 plenipotentiary conference,⁸⁸ the Union’s technical staff now has authority to use perhaps one-quarter of the \$2 million estimated to be the minimum necessary for computer trials of a draft plan.⁸⁹

Moreover, in their closing statements, the United States, the United Kingdom and France implicitly advised that if the nonaligned group and its allies wanted to get any plan off the ground, they would have to find the money to pay for it. The United States said that it would find “unacceptable” any ITU request for intersessional work that would cause the 1982 budget limits to be exceeded. It thus “urge[d] member states to join in demanding strict adherence to the inviolability of established financial limitations.”⁹⁰ In

11.20 GHz, 11.45–11.70 GHz, 11.70–12.20 GHz (Region 2); 12.50–12.75 GHz (Regions 1 and 3) and 14.00–14.50 GHz; and in the Ka band, subject to further study, at 18.10–18.30 GHz, 18.30–20.20 GHz and 27.00–30.00 GHz. The remaining radio spectrum allocated to the FSS by Article 8 of the ITU Radio Regulations will continue to be governed by existing coordination procedures.

Apart from that of the United States, MPM-type proposals were introduced by France, Proposal-Cyclic Planning Method, ITU-ORB-85 Doc. 12; the Netherlands, Planning Method for Guaranteeing in Practice Equitable Access to the GSO-Agenda Item 2, Doc. 127; New Zealand, Proposals for the Work of the Conference, Doc. 8; and Canada, Proposal for the Work of the Conference, Doc. 222. These rather disparate proposals (along with others that will be advanced during the intersessional period) must somehow be reconciled and translated into draft Radio Regulations by the close of the 1988 WARC.

⁸⁶ See 1985 U.S. WARC DELEGATION REPORT, *supra* note 47, at 3 and 16.

⁸⁷ The author’s notes of Ambassador Burch’s remarks at Washington, D.C. conference sponsored by the Annenberg School of Communications (Oct. 29, 1985).

⁸⁸ See ITU Convention, *supra* note 3, Additional Protocol I.

⁸⁹ This budget was not substantially changed by the ITU’s June 1986 Administrative Council meeting. See Com. Daily, July 7, 1986, at 9.

⁹⁰ Statements relating to the Report, *supra* note 77, at 6.

the words of one U.S. official, "From [a] damage control aspect, if there's no time or money for [developing] a plan, the U.S. can't be hurt."⁹¹

This conclusion is almost surely wrong. Whatever reservations one may have about the wisdom of allotment plans, the budgetary policies that the United States seems intent on pursuing are likely not only to polarize the ITU even more but to be self-defeating. Western countries with active satellite programs and proven launch vehicles may well be the most immediate beneficiaries of the allotment plan, which will allocate a roughly equal amount of radio spectrum to all countries. Especially in the C band, this "pre-planned" spectrum may become quite valuable as the prime U.S. orbital arc becomes increasingly crowded.⁹²

More important, to the extent that a U.S.-engineered austerity program is seen to sabotage the plan, the quid pro quo—namely, that only procedural changes will be made in the ITU rules for the bulk of the satellite radio spectrum—is likely to unravel. This could have serious adverse consequences for the ITU, both in the coordination of satellite orbital slots and in a wide range of other activities that are of crucial importance to the world's broadcasting and telecommunications communities.

Accordingly, in planning for the 1988 WARC, there appears to be good reason for the United States and its allies not to devote their attention exclusively to hammering out an acceptable MPM.⁹³ Given the voting power of the Third World bloc at the ITU, adoption of a viable MPM in 1988 may not be a precondition for adoption of a workable allotment plan, but the converse is almost certainly true.

Because the particulars of any allotment plan will be subject to careful technical and political scrutiny, and because the credibility of its advocates and detractors will be so publicly at stake, the 1988 WARC might be greatly advanced by having the planning issues reviewed by an independent orga-

⁹¹ BROADCASTING, Sept. 23, 1985, at 57.

⁹² The USSR also appears to have a major stake in the viability of the WARC's allotment plan. In addition to its allotment, the Soviet Union will have over 20 other satellites "grandfathered" into the plan because they were formally announced before last year's WARC. See ITU-ORB-85 Doc. 275, *supra* note 51.

⁹³ Even on its own terms, the MPM strategy may prove self-defeating. Writing up a new set of ITU Radio Regulations to accommodate equitably the competing demands of a score or more countries at periodic multilateral meetings is likely to be an administrative nightmare. The present, primarily bilateral, coordination process, whose Byzantine rules are virtually incomprehensible even to most lawyers, works as well as it does largely because of the expert offices of the IFRB. Creating another regulatory labyrinth, particularly one that will be applied largely by committee (the MPM) rather than by bureaucrats (the IFRB), does not seem to be what the quickly changing world of satellite communications needs.

Countries investing billions of dollars in satellite systems, especially developing countries with scarce resources, can ill afford unworkable international arrangements. Hence, if the MPM cannot be kept simple and understandable to all, then perhaps its life should be limited (e.g., to 10 years) until an appropriate variant of the informal regulatory regime now used by the ITU to harmonize most equipment standards can be developed. See, e.g., Rutkowski, *Deformalizing the International Radio Arrangements*, TELECOM. POL'Y, December 1983, at 309. For more modest, but still useful, reforms of the Radio Regulations applicable to the FSS, see also the United Kingdom's suggestions in Proposals for the Work of the Conference, *supra* note 27, at 7.

nization. The technical and financial resources for such an intersessional effort can be found in various countries, in both the public and the private sectors. Joint projects among several countries can also be imagined.

The launching of such a parallel effort, whether under academic auspices or otherwise, might go a long way toward answering one of the key questions left unresolved by last year's conference: can a plan be designed that is flexible enough for countries to trade, lease or combine orbital positions?⁹⁴ Whether many countries (or multi-administration systems) will benefit from a plan may depend upon an affirmative answer. The completion of an independent study on this question, among others, in conjunction with the ITU's own work, would give the 1988 WARC a realistic opportunity to implement a world satellite plan that is a practical as well as a political monument to international cooperation.⁹⁵

GREGORY C. STAPLE*

1986 UNAT ELECTIONS

The United Nations Administrative Tribunal (UNAT) has elected Herbert Reis of the United States, a former Counselor at the U.S. Mission to the United Nations, as its Second Vice-President for the coming year.

⁹⁴ The United States argued strenuously at the WARC that, because of the inherent limits that any a priori allotment plan would impose on satellite service areas, a marketplace reallocation of unused satellite slots was technically impossible. See *Two Real Problems with a Priori Planning*, ITU-ORB-85 Doc. 164. Despite the Reagan administration's general support for free-market policies elsewhere, the Government's failure to support such schemes at the ITU appears to stem largely from private sector concerns that such a policy could lead to proposals to auction portions of the "domestic" radio spectrum. Neither the Communications Act of 1934, 47 U.S.C. §151 *et seq.* (1982 & Supp. 1985) nor the FCC's rules thereunder currently require licensees to pay for using radio frequencies, regardless of their economic value. Last year, however, as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, Congress directed the FCC to collect "cost of regulation" fees for processing most license applications. The congressionally prescribed schedule includes a fee of \$18,000 for commercial satellite applications.

For a review of some of the problems associated with marketing orbital slots, see Robinson, *supra* note 3, at 47-52; Wihlborg & Wijkman, *Outer Space Resources in Efficient and Equitable Use: New Frontiers for Old Principles*, 24 J. L. & ECON. 23 (1981).

⁹⁵ Despite the unprecedented series of recent rocket failures, which have grounded the U.S. space shuttle and Europe's Ariane fleet, the West still is likely to enter the 1990s as the principal launch contractor for commercial communications satellites. See, e.g., *Com. Daily*, June 17, 1986, at 2; *ECONOMIST*, June 7, 1986, at 105. Thus, although near-term launch problems may blunt the practical urgency for a new world satellite order, the technical and political issues raised at the 1985 WARC can be expected to reassert themselves by the decade's end.

Readers interested in a further exploration of this and other issues raised by the Space WARC may wish to obtain a copy of the PAIL Institute's teaching package "The New World Satellite Order: A Documentary Review, with Commentary of the 1985 Space WARC."

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Mr. Reis has served on the tribunal for 5 years. Samar Sen of India and Arnold Kean of the United Kingdom were elected President and First Vice-President of the tribunal, respectively.

UNAT, whose nine members are elected by the General Assembly each year, reviews complaints and issues relating to conditions of employment of UN staff. Matters may be brought before it by the Secretary-General and member states, as well as by UN staff members themselves.

The election of Mr. Reis, who also teaches human rights law and international organizations law at New York University School of Law, is a significant recognition of his eminence as a legal scholar by the community of his peers. It will be a matter of considerable satisfaction to his many friends in the American Society of International Law.

T. M. F.

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

REVIEW ARTICLE

PREPARING STUDENTS FOR PRACTICE IN INTERNATIONAL LAW: ON TEACHING THE LAW OF INTERNATIONAL TRANSACTIONS

International Economic Law (2d ed.). By Andreas F. Lowenfeld. 6 volumes: I, *International Private Trade*; II, *International Private Investment*; III, *Trade Controls for Political Ends*; IV, *The International Monetary System*; V, *Tax Aspects of International Transactions* (by David R. Tillinghast); VI, *Public Controls on International Trade*. New York: Matthew Bender, 1981–1984. Indexes. \$45/vol.*

In 1968, three law professors who had previously practiced in the Office of the Legal Adviser (one, indeed, as Legal Adviser) published a casebook for use in teaching the basic international law course as then offered at most law schools.¹ *International Legal Process* was markedly different from the international law casebooks then available. This difference consisted not so much in its authors' conception of international "law" as being the day-to-day work of states' foreign offices (shades of Justice Holmes, after all) or the book's "problem" format, but in its presentation of materials in such a way as to further among students an understanding of foreign relations law as that term was then defined in the *Restatement of the Foreign Relations Law of the United States*.² Thus, the two volumes of the casebook and its heavy documentary supplement, while notably short on the traditional stuff of public international law casebooks—decisions of the World Court and arbitral decisions—were filled with excerpts from U.S. congressional hearings, congressional committee reports, presidential statements, texts of agency regulations, drafts of bills, a wide range of U.S. statutory materials, articles of the Constitution, federal court decisions involving constitutional claims, decisions of foreign courts, reports of GATT panels, the full texts of treaties and executive agreements, including the UN Charter and the Bretton Woods Agreement, and newspaper reports on international events—in short, the

* The bulk of this review article was written by Professor Cynthia C. Lichtenstein, who speaks in the first person. Professor Herbert Lazerow contributed the section on volume V.

¹ A. CHAYES, T. EHRLICH & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* (2 vols., 1968).

² *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §2 (1965). The *Restatement* defined the law it was restating as comprising international law as traditionally understood *plus* that part of U.S. municipal law which gives effect to rules of international law or involves matters of significant concern to U.S. foreign relations. The paraphrase of the *Restatement's* definition is taken from Leigh and Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 21 *BUS. LAW.* 853, 853 n.1 (1966).

mounds of material that as practicing lawyers for the State Department the authors must have used. Furthermore, the casebook materials and accompanying questions were so arranged as to force the students to use the texts of the materials in preparing for classroom discussion of the foreign relations problems presented (such as the Cuban missile crisis, the "chicken war" in trade with the EEC, the devaluation of the pound). Finally, the materials and questions selected for the various chapters were presented without making any distinction, except by grouping, between problems involving political (UN Charter, etc.) and economic (transport, communications satellites, trade, monetary affairs) relations among states.

Of what "use" was this to law students? How many of them go to the Office of the Legal Adviser? The curriculum committees of law schools usually classify the basic international law course as a "perspective" course, together with jurisprudence and legal history, good for the souls and minds of students, but useless to them in daily practice. Given the nature of traditional public international law courses, with their emphasis on general principles, the curriculum committees may not be wrong: the issues (the legality of the use of force, redress of violations of human rights) are of extraordinary importance to all of us as human beings, but very few students envision themselves arguing before the International Court of Justice or able to afford a human rights practice.

This classification of "international law" courses is in contradistinction to courses labeled "international business transactions" or to courses in international tax law. The latter courses are taken by business-oriented students who hope to become associated with firms representing multinational corporations or to join corporate legal departments. Unfortunately, since Brewster and Katz³ and Fulda and Schwartz⁴ became seriously outdated, no casebook-type of materials specifically aimed at such courses were in print until January 1986.⁵ Professors Steiner and Vagts in their casebook prepared for the course in public international law⁶ always attempted a compromise

³ M. KATZ & K. BREWSTER, JR., *THE LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS: CASES AND MATERIALS* (1960).

⁴ C. FULDA & W. SCHWARTZ, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL TRADE AND INVESTMENT* (1970).

⁵ A volume in the West Nutshell series on *International Business Transactions in a Nutshell* by Donald T. Wilson was published in 1981, and a second edition in 1984, but Nutshells are generally used only as supplements. In January 1986, a new casebook, Folsom, Gordon and Spanogle, *International Business Transactions: A Problem-Oriented Coursebook*, was circulated to law teachers. A cursory glance suggests that the book is very different from the Lowenfeld series and may not appeal to the same group of teachers; Folsom, Gordon and Spanogle covers much more territory (in far less detail) and gives students excerpts from secondary materials (law review articles) as fodder for the "problems." The result will be, I think, to raise a number of issues for students that they should begin to think about if in practice they deal with the particular kind of problem; but the book will not plunge the students, as do Lowenfeld's extensive document sections, into the very stuff of practice. Professors Murphy and Swann are understood to be preparing another transaction casebook.

⁶ H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (2d ed. 1976). Indeed, the "economic" portions of the book, the only ones I have worked with, are excellent. When I first began to teach international economic law, I shamelessly excerpted from the book the introduction to the GATT and a trade problem.

between presentation of material for the "public" law sector and materials, such as their chapters on the rights of aliens (immigration law), international tax and trade, that they hoped could be used by the "private" international business law teacher. Apparently, they have concluded that the combination is neither fish nor fowl, for the third edition is two separate books, dividing the materials along the lines of the traditional curricular split.⁷

Professor Lowenfeld, on the other hand, has been iconoclastic from the beginning of his teaching career. As noted, the chapters on economic relations in the "public" international law casebook that Lowenfeld published with his former colleagues from the Legal Adviser's Office did not differ in format from the chapters dealing with the more traditional subject matter of public international law. It was possible to use the same format for both "economic" and "political" chapters in Chayes, Ehrlich and Lowenfeld⁸ because the "economic" chapters focused on the public regulatory structure of economic relations among states. In preparing his volumes of the *International Economic Law* series for Matthew Bender, volumes based, with certain exceptions to be discussed, on the "economic" chapters of the original casebook, Lowenfeld continued this primary focus on the public regulatory structure. This concentration reflects Lowenfeld's conviction, demonstrated in the Matthew Bender series, that

in international law (and perhaps in all law) the distinction between the "private" and the "public" side doesn't really belong. One cannot advise or defend private clients without an understanding of the powers and limitations of governments, and one cannot advise or participate in government without a grasp of how private firms and their legal counsel operate.⁹

It is exactly this treatment of international economic law that makes the Matthew Bender series so useful for the teacher of international transactions, that is, for the teacher of students who want to become, in the phraseology of two practicing lawyers who should know, "practitioners of international law [with] their private clients."¹⁰ Lowenfeld's point about the advisement of private clients is well taken. Law schools require constitutional law courses of their students and recommend an administrative law course because of this recognition of the ineluctable relationship between the private and public sides. Why should it be any different for the practitioner whose private clients engage in transactions that cross national borders?

Thus, the mass of statutory materials, texts of treaties, regulations, drafts of bills, EEC directives and other materials involving "matters of significant concern to United States foreign relations" that filled the original *International Legal Process*¹¹ casebook and its document supplement, and continues

⁷ H. Steiner & D. Vagts, *Transnational Legal Problems* (3d ed. 1986) appeared in January; the separate coursebook, D. Vagts, *Transnational Business Problems*, appeared in March 1986.

⁸ CHAYES, EHRLICH & LOWENFELD, *supra* note 1.

⁹ Lowenfeld, *On Teaching International Economic Transactions*, MATTHEW BENDER LAW SCHOOL REPORT, November 1984, at 1.

¹⁰ Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 21 BUS. LAW. 853, 857 (1966).

¹¹ CHAYES, EHRLICH & LOWENFELD, *supra* note 1.

to fill the *International Economic Law* series, is as useful to the student who hopes to go into private practice as to the student who dares to hope for the Legal Adviser's Office. Long ago, the "practitioners of international law" Monroe Leigh and Timothy Atkeson published a two-part article, *Due Process in the Emerging Foreign Relations Law of the United States*, in the *Business Lawyer*.¹² Leigh and Atkeson believed then that they had to explain what "all this [the role of the State Department in the 'orderly balancing of the public and private stake in American economic interests abroad' and the influence thereon of the spirit of due process]" had "to do with readers of the *Business Lawyer*."¹³ A great deal, they demonstrated by detailing the variety and volume of international business matters affected by executive branch decision. That was in 1966. Today our students can read in the financial section of their daily newspaper (the *New York Times*, the *Washington Post*, the *Boston Globe* and/or the *Wall Street Journal*) about IBM's difficulties with the European Community in its exercise of "extraterritorial jurisdiction." The international debt crisis receives front-page attention. International economic policy is no longer arcane; Lowenfeld's coursebooks stress the relevance of the public structure for students who see themselves as practitioners.¹⁴

To judge by indications in his prefaces, Lowenfeld also hopes that his series will be of use to the person already in practice. Each of the volumes will be useful to practitioners who are novices in the particular area covered and need a *structural* orientation in it before turning to the U.S.C.A., the C.F.R. and the appropriate C.C.H. reporter to update their materials and apply the regulatory structure to their own clients' particular problems. Specialists will find the volume that concerns their area rather like a Practising Law Institute beginning course, containing much too much utterly familiar general narrative and omitting too much that is strictly technical.

The text of four of the volumes in the series¹⁵ centers on a particular event or events in transnational relations. Volume II on *Private International Investment* first tells the story of a multinational paper company's aborted attempt to build a major pulp-processing installation and supply it from Crown forests in Canadian wilderness, and then deals with copper in Chile. Volume III, *Trade Controls for Political Ends*, treats of East-West trade, the

¹² Leigh & Atkeson, *supra* note 10, and 22 BUS. LAW. 3 (1966).

¹³ Leigh & Atkeson, *supra* note 10, at 853.

¹⁴ Of course, I recognize that most professors who label their courses "international business transactions" are aware that the dichotomy between public and private law is false; they are equally aware of the necessity for plunging their students into the use of the primary sources in the field—the municipal law and the "administrative" law of international organizations. I suspect that part of the reason for the dearth of casebooks in the field is that most professors make up business-planning problems for their students and then have them utilize the library in planning to advise the private client. Lowenfeld achieves the result with self-contained resource materials by having six volumes, each with extensive "document" sections; only two to three of which can be covered in a normal semester.

¹⁵ Volume I in the series, *International Private Trade*, is more like an ordinary casebook than any of the others and so will be discussed separately. Volume V, the only volume in the series not prepared by Professor Lowenfeld, *Tax Aspects of International Transactions* (2d ed. 1984) by David Tillinghast, is also the only one I have never used.



Jackson-Vanik amendment, the grain embargo, the USSR pipeline imbroglio (in the second edition), the Arab boycott of Israel and the international sanctions against Rhodesia. Volume IV, *The International Monetary System*, relates in narrative form the sad history of the creation and ultimate breakdown of the Bretton Woods system and (in the second edition) tries to help students understand the extraordinarily fragile nature of an international financial system in which sovereign balance-of-payments financing is provided chiefly by private banks. In volume VI, *Public Controls on International Trade*, the history of attempts by the United States, the EEC and Japan to reconcile individual economic interests in the production of steel with an international trading system theoretically based on free trade is used to teach both the GATT rules and U.S. trade law. These "stories" are all narrated. The students work through the appended extensive documentary sections while attempting to answer questions on the "story" that appear at approximately 20-page intervals. In each case, the narrative is extremely well written and a pleasure for students and instructors to read.

The students, of course, are much less enthusiastic about the hard work of plowing through the documents but, if pushed, come to realize that *that* is where they are learning what the work of a practitioner is all about. This arrangement of teaching materials also teaches students, if they have not, alas, met the idea elsewhere, that it is impossible to deal with the stuff of the "law" in the abstract, that lawyers cannot possibly apply statute and regulation to their clients' problems unless they first understand the nature of their clients' industries. Students come to understand that the "law" is different if their client produces or imports steel rather than clothespins or canned mushrooms;¹⁶ and that investing in copper in Chile involves far different considerations (including the nature of the world copper market) from setting up a pulp mill in Canada. It is this insistence on tying the study of the "law" to the particular economic and political context that causes me to prefer using Lowenfeld's volumes to teach my school's only present offering in "transactions." The alternative would be to make up international business-planning problems that could give the student only the sketchiest idea of the client's economic structure. Lowenfeld's stories are "real" and students appreciate the verisimilitude.

The volumes are, of course, uneven and users will have favorites, depending upon their particular area of interest or what they think will intrigue students because of this year's headlines.¹⁷ Moreover, some second edition revisions seem more successful than others. Volume II, *International Private Investment*, containing the Canadian and Chilean stories described above, always strikes me as a perfect gem with which to teach not only the legal considerations in advising a client concerning foreign direct investment, but

¹⁶ This example is Lowenfeld's from his essay for Matthew Bender, note 9 *supra*.

¹⁷ After the attempted imposition of export controls on French and English rotors for the Russian gas pipeline, my students requested a unit on trade controls and we used volume III, rather than doing a unit on international management of global resources (the seabed, space, the moon and Antarctica) based on unpublished materials of my own that follow the Lowenfeld format.

also the legal aspects of the financing of such investment.¹⁸ The original volume concluded, as I remember, with some slight material on the Canadian legislation on the control of foreign investment. In the second edition, Professor Lowenfeld has expanded and updated this material and added materials on the United Nations proposed Code of Conduct for Multinational Corporations. International action with respect to the phenomenon of the multinational has been marked by a high degree of North-South conflict and considerable rhetorical smoke, though only the tiniest of actual fires. The new materials never seemed to me to add much, and I have always wished that Lowenfeld had decided instead to revise his book by expanding the materials on remedies, national and foreign, for the expropriated investor. *International Private Investment* describes Kennecott's worldwide effort to seize exported Chilean copper after the expropriation of the mines, but the story of Chilean copper ended when the copper companies settled with their investment insurance company and took their tax write-offs. The second edition might have added a story about an investment in Iran and followed it through issues under the U.S. Foreign Sovereign Immunities Act, the *Dames & Moore* case and, finally, the Iranian-U.S. Claims Tribunal.¹⁹

The new edition of the last volume, *Public Controls on International Trade*, I find the least "teachable," probably because trade law has "grewed like Topsy." Volume VI in its second edition attempts not only to cover the public international law of GATT (including the Tokyo Round agreements) but also to delve into the growing complexities of the specialized practitioner's use of U.S. trade legislation for offensive action against the client's foreign competition. Lowenfeld indicates in his preface to the volume that he finds that the subject makes a good semester's package with volume IV, *The International Monetary System*. I find that the specialist's technicalities now added to the second edition make it too dense and complicated, for me at least, to teach while giving adequate attention to the international monetary system. Moreover, unlike the casebook generally relied on for a separate course devoted to the law of international trade, John Jackson's *Legal Problems of International Economic Relations* (1977, now seriously in need of a new edition), *Public Controls on International Trade* does not cover trade with nonmarket economies²⁰ or contain any materials on trade issues involving the developing

¹⁸ Taking students slowly through the Eximbank loan agreement contained in the Chilean portion amounts to a crash course in bank-lending documentation. A footnote description of the London copper exchange is also the best quick description I have read anywhere of a commodities market and forward purchases for hedging purposes. Even when I do not teach the volume on private investment, I use the footnote on the copper exchange to help students understand the currency markets for their work in the volume on *The International Monetary System*.

¹⁹ Perhaps the third edition of this volume will catch us up on these issues (and many others, including the controversy over the wording of the *Restatement (Revised)*) in the area of realization on expropriated foreign investment.

²⁰ It could, of course, be supplemented with the excellent materials on East-West trade from volume III, *Trade Controls for Political Ends*, but the focus of those materials is not on how trade with nonmarket economies fits into the GATT system, but on the impact of politics on trade law.

nations.²¹ It would seem that, in both the trade and the monetary areas, the world has become so complicated that teachers who wish to devote a full semester to issues in international trade (leaving aside money) would do well to await a new edition of the Jackson casebook or spend a summer creating their own materials to supplement Lowenfeld's volume.

In contrast to volumes II and VI, the second editions of volume III, *Trade Controls for Political Ends*, and volume IV, *The International Monetary System*, seem to me to be as successful as the first editions. *Trade Controls*, of all the six volumes, is the most diffuse, because East-West trade issues are as much concerned with the problem of structuring trade between market and non-market economies as they are with the utilization of controls for political purposes. As Lowenfeld himself suggests, it is possible to use the book for a thorough exploration of the issues of so-called extraterritorial jurisdiction without going into the history of the grant or denial of most-favored-nation status to the Soviet Union. Similarly, the Rhodesian sanctions materials do not concern the attempt by one sovereign to exercise its controls through their imposition on entities subject to the territorial jurisdiction of another, but rather present a rare example of UN group enforcement of a group decision by means of trade controls to be imposed by members. The Rhodesian materials fit more easily into a course working through methods of obtaining compliance with international law than into a course that takes up issues of the exercise of extraterritorial jurisdiction. For teaching the latter, however, the second edition of volume III is even better than the first. The second edition of *Trade Controls* not only contains the story of the reaction of the United States to the imposition of martial law in Poland by the attempt to deny British- and French-made gas pipeline rotors to the Soviet Union. Lowenfeld has also added an exploration (to my knowledge, the only one in a casebook) into the extremely interesting legal issues involved in the imposition of *monetary* controls on the Iranian Government's bank deposits in U.S. banks, both in the United States and abroad, at the time of the Iranian hostage crisis.

The second edition of volume IV, *The International Monetary System*, pulls off the neat trick of integrating into the materials, in many ways the most "public" of the series,²² text on the ongoing debt crisis, a crisis that intimately

²¹ Once, before the U.S. international trade legislation began to be the work of a specialized bar and to require teaching time, I taught the mimeographed version of volume VI, first edition, together with Lowenfeld's mimeographed updating of the chapter from the original *International Legal Process* casebook, *supra* note 1, on the International Coffee Agreement. This combination—with its look at international commodity agreements—was a springboard into more general discussion of Third World issues in the international trading system and still left time in the semester to utilize the first edition of *The International Monetary System*. Today, apart from the material on Chile in *International Private Investment*, there is nothing in the *International Economic Law* series that lends itself easily to integration into the course on Third World or development issues. Often, students can be encouraged to take the perspective of the debtor nations if the course utilizes a seminar format and treats the debt crisis. Nevertheless, teachers here are on their own unless Oscar Schachter of Columbia or Robert Meagher of Fletcher can be persuaded to part with mimeographed materials.

²² There is, however, in volume IV a separate chapter devoted to "monetary" law as it affects private transactions.

involves the health of the private actors in the international financial system, the multinational banks. The new edition allows students to understand just how "interdependent" the economies of the major trading nations are, and just how dependent the economic health of the United States (or at least the health of its banking system) is on whether or not the Argentine and Mexican debts can be successfully "restructured." Students are led to ponder a world of international economic relations that seems very fragile. This edition brings Bretton Woods very close to home.

Volume I, *International Private Trade*, and volume V, *Tax Aspects*, seem to fit much less well into the overall scheme and methodology of the series. Neither tells a "story" or "stories" of contemporary events in international economic relations and neither grows out of any chapter in the original *Legal Process* casebook. As a result, neither contributes, I suspect, to students' understanding of the impact of executive branch decision on the work of the business lawyer, the very essence of the other volumes.

Volume I is a slight collection of *cases* that would be useful to the lawyer who suddenly acquires a client with an international sales contract; in short, it is an introduction to an area sometimes called "international commercial law." It acquaints the student with a financing instrument his commercial law teacher did not have time to cover, the letter of credit, and does this through English cases, thus stressing the international use of the beast. The volume also has the student shake hands with international commercial arbitration, and the key commercial concept of force majeure. The problem, of course, is that Lowenfeld intends the book to be covered in 10 classroom hours (as indeed it can be) and for the class then to move on to another book. Unfortunately, this amount of time would not seem to be an adequate foundation for an international commercial practice and, with the exception of the extensive materials on the Export Administration Act and the enforcement of export controls in volume III, the coverage does not segue well into any of the other materials in the series. Professor Harold Berman for many years taught a course in international trade law at Harvard, and his extensive mimeographed materials contain not only the cases in volume I, but also extremely useful materials on the attempts at international codification of sales law and a good introduction to the treaty now before the Senate, the UN Convention on Contracts for the International Sale of Goods. The Berman approach seems to me preferable. Equally, Professor Lazerow, whose comments on volume V follow, concludes that volume V is more useful for a separate course in the subject matter than as part of a "transactions course."

Volume V of the *International Economic Law* series, *Tax Aspects of International Transactions*, was written by David Tillinghast, a practitioner and part-time teacher. It is not designed for the tax specialist, but for the international lawyer. In five hundred pages, as well as substantial appendixes and the supplemental use of the Internal Revenue Code and the Income Tax Regulations, the student is guided on a problem-method tour of three basic types of transaction: (1) a U.S. corporation wishing to do business in Europe; (2) a U.S. company doing business in the developing world; and (3) a European company wishing to sell or manufacture in the United States.

The attempt is to familiarize students with general tax principles without involving them in the minutiae of tax law. It is largely successful. Professor Tillinghast poses problems reflecting the reality of international practice such as branch vs. subsidiary, transfer of technology to more or less controlled companies and choice of business between licensing, export sales to independent distributors, export sales through controlled distributors, manufacturing abroad and joint ventures. He covers a broad range of corporate and international tax problems. The problems are not confined to technique alone; the basic policy issues of international tax law are canvassed in notes following each section. While a certain amount of detail is necessary in some areas, such as the foreign tax credit and Subpart F, the course can easily be kept at the level of general planning principles, with the detail a useful reminder of the need to check the numbers to assure that the solution chosen is really best. The problems are sufficiently well-balanced to require students to weigh advantages and disadvantages of each plan and reach the same sort of imperfect conclusions that practice demands.

Whether the book has a place in an international business transaction course is another matter. Students who have never had a tax course would find it hard to finish the book in a 3-credit course. A class that has studied both basic and corporate tax could probably do it in about 36 hours. While one could transplant parts of the book to an international business transactions course, it would be hard to devote enough time to taxes there to do more than show how business decisions can be influenced by tax considerations.

In short, the book is an excellent teaching tool for the advanced course for which it was designed.

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Jurisprudence: A Descriptive and Normative Analysis of Law. By Anthony D'Amato. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. xiv, 334. Index. Dfl.140; £35.75; \$53.50.

For all his work in international law,^{*} Anthony D'Amato's real vocation is jurisprudence. He finds room for the perennial questions in whatever he writes: what is law, how does it work (especially in the problematic instance of international relations) and what is law's relation to morality?⁷ On occasion D'Amato has addressed these questions directly and systematically, most notably in two essays originally appearing in the *Yale Law Journal* and *Stanford Law Review* and now bracketing 10 other essays to make up the book at hand. All but one appeared in law reviews between 1970 and 1980. The one exception is a book chapter completed in the middle of the decade but not published until 1982. Three essays concern themselves with international law. Others focus on matters as diverse as cybernetics, "computerized justice" and the death of Socrates (chs. 4, 5, 8). Hypothetical cases and thought

experiments abound. D'Amato's breadth of reading and capacity to recognize jurisprudential questions in all realms of human experience is remarkable. Equally remarkable is the thematic coherence of work so topically diverse and the clarity of its expression.

The first essay, which is the longest and easily the most important, takes as its frame of reference the perspective of a puzzled person, whom D'Amato calls *K*. The reader is immediately reminded of the puzzled protagonist in Franz Kafka's chilling novel, *The Castle*, also called *K*. D'Amato's brief introduction refers to "statutes, rules, codes, and regulations that are Kafkaesque in their prolixity" (p. 1). Does D'Amato hold a Kafkaesque view of law and society as a bureaucratic nightmare, overwhelming all reason in its relentless devotion to Weberian rationality? Not at all. He immediately equips his *K* with a lawyerly habit of mind, which helps in predicting what officials will do. Here D'Amato departs most strikingly from Kafka's vision: officials are consistent ("Consistency is a price officials pay for power," p. 7) and thus predictable. Kafka's officials are predictable only in their unpredictability. If there is reason to their behavior, never is it evident to the baffled *K*. What D'Amato's consistent officials have are reasons for their conduct which, if not immediately transparent, are intelligible to the lawyerly mind. Lawyers make their living by "reading" official minds and selling their readings (ch. 3). Officials in their turn use lawyers' readings to make sense of their jobs (ch. 12). Officials and lawyers share the same conceptual world, which is, for that reason, a reasonable one at least to them. D'Amato does not actually state this constructivist interpretation of official consistency, but it is implied in having the lawyer serve as the puzzled person's guide to the conceptual world lawyers share with officials.

Thus, it is unreasonable only to the uninitiated that official conduct may not correspond to rules on the books. Such a rule may reliably serve "as a shorthand description of probable official behavior" (p. 8). It may not, in which case *K* is not at a loss, for consistent official behavior is still the norm and a shorthand description always available. Then are observable consistencies in behavior always rules? D'Amato does not say. That he does not is important, because it would have been easy enough for him to have done so. The result would have been a broadened version of the legal realist position that law is what judges say it is, which is itself a variation of the positivist doctrine that law is what legislators decree. D'Amato's officials may thus be judges, legislators and the full panoply of executive personnel whose conduct matters to private persons like *K*. If D'Amato all but affirms a comprehensive rendition of legal realism to explain what law is and how it actually works, he nevertheless will not call himself a legal realist. Indeed, the essay was originally, quite tellingly, entitled "The Limits of Legal Realism."

D'Amato's curious relation to legal realism can be explained. Legal realism is an attempt to adapt positivism to the circumstances of law in use. D'Amato obviously approves of this expedient but fears the consequence. Legal realism undercuts the formal integrity of positivism and, driven to its logical conclusion, abandons limits. Official behavior need not be consistent or reasonable (at least to the observer) for it to be a rule in official minds. If rules are whatever officials make them, then Kafka lurks in legal realism.

For D'Amato the alternative is naturalism. It is the large, but not always the clear, intent of his work to graft legal realism onto a naturalist stance. Doing so spares *K* and everyone else the consequences of giving up the positivist view of law as a system of promulgated rules. One can still talk about rules in relation to official behavior without suggesting that the rules are nothing more than what officials say and do. Put differently, naturalism provides a substantive basis for attributing reason and consistency to officials. At the same time, it is not necessary to expect that conduct to be consistent with a formal rule set, which is realistically unwarranted.

A legal realism grounded in naturalist doctrine is not altogether original with D'Amato. One may see it in Ronald Dworkin and possibly John Rawls. While D'Amato sharply criticizes the latter for ambiguities in his antiutilitarian theory of justice (ch. 9), he reveals a qualified affinity for the former, whom he describes as either demonstrating the deficiencies of or providing a supplement to positivism (pp. 94, 114 n.18, 146 n.29), and being either insistent or uneasy as a positivist (pp. 57 n.9, 282). Why the ambivalence? If challenging H. L. A. Hart does not make Dworkin a naturalist from D'Amato's point of view, how can earlier challenges to Hart make Lon Fuller "the leading representative of the natural law school" (p. 191)? D'Amato cannot seem to decide whether not being a positivist makes one a naturalist.

In his novel effort to treat law in cybernetic terms (ch. 4), D'Amato defines positivism in the narrowest possible sense—legislators make law, judges use it—and defines as naturalist any model of law complex enough to include judicial and executive/administrative "subsystems" in the legal (i.e., lawmaking) system (p. 141). Naturalist is equated with "non-positivist" (p. 139), and Dworkin no less than Fuller qualifies as such. D'Amato is at his weakest in stipulating this weak form of naturalism. Few positivists (Hart included: pp. 132–36) hold to such a circumscribed definition of positivism. Least of all do legal realists. Doctrine in the last century has tended to assign naturalism the narrowest possible definition and describe as positivist all models that are not naturalist. Thus, legal realism is positivist in the broad sense that law is made by people, usually officials, to suit human purposes.

D'Amato also insists that "law does not exist for itself but rather as a means toward the attainment of human ends" (p. 212). Who disagrees? Perhaps some analytic philosophers are discomforted by teleology in social theory, but as a working matter most social scientists share with legal scholars a functionalist view of society. Yet virtually all of them would find D'Amato's express equation of teleologist and naturalist (*id.*) eccentric and unhelpful. D'Amato seems to believe that by showing that practically everyone is a functionalist, he has established a second, stronger form of naturalism. The emphasis is no longer on the complexity of the legal system. Instead, it is on the teleology inherent in the prevailing idea of a social system.

D'Amato takes his teacher Lon Fuller as exemplar of a purposive view of law and society: principles and norms are "'in the air,' so to speak" (p. 156, citing Fuller).¹ Moral considerations obviously always affect those who par-

¹ *Human Interaction and Law*, 14 AM. J. JURIS. 1 (1969).

ticipate in a legal system. The larger and more numerous the categories of participants (D'Amato's weak form of naturalism), the more considerations there are in the air—moral and otherwise. It is striking but not surprising that consensus operating under such conditions of diversity results in community standards, whether expressed as principles and norms or in laws. The metaphor "in the air" deceives, for the social world is not so lacking in structure.

D'Amato's stronger form of naturalism may describe the way law counters social entropy but does not explain it (*cf.* pp. 140–41). As suggested earlier, he flirts with an explanation by positing official consistency. Officials are not alone in behaving consistently. We all tend to do so, and we all expect consistency from others. What makes this expectation realistic is a shared, stable frame of reference transmitted through and constructed from human practices. Each of us constructs a social world resembling that of everyone else exposed to the same structuring elements. No two individuals' social worlds are identical, but what they have in common allows for generalized articulation—as through principles, norms and laws—in their common support. Conversely, human purposes and moral concerns—as reflected in principles, norms and laws—are themselves social constructions, any number of which are capable of satisfying the material conditions of human life. Thus, they are bound to differ for individuals whose social worlds do not connect.

D'Amato finally rejects a constructivist explanation of social consistency for the very reason it is fashionable in social theory. Constructivism separates consistency from content in social conduct. D'Amato's fear of relativism elicits yet a stronger form of naturalism, in which content is assured. This is of course the naturalist tradition paradigmatically represented by St. Thomas Aquinas. Natural law so conceived depends on "the essential substantive fact that human purpose is everywhere pretty much the same," and can be formulated as "two great substantive principles: the goal of survival of the human species, and justice to individuals" (p. 214). D'Amato requires nothing further of natural law to satisfy his need for limits. Social contexts constantly change, and so do specific norms that nevertheless honor these principles. In a fascinating illustration of rights' reasoning to achieve "right reason," D'Amato interprets species survival in the instance of underpopulation as proscribing abortion and in the instance of overpopulation as fostering it (pp. 215–17).

The skeptical reader may wonder whether any two substantive principles can do everything that D'Amato, for all his interpretive ingenuity, wants them to. The phrase "justice to individuals" benefits from its vagueness. D'Amato may well see it as procedurally directed—just conduct entails honesty, good faith, equal treatment in equal circumstances and proportionality of response—while species survival is truly substantive and thus primary when its requirements conflict with the procedural requirements of justice. Were he to insist on both principles as equally substantive, conflicts between them would be inevitable. Collective rights are implied by the principle of species survival and rights against collectivities by the principle of justice to individuals. In the absence of a "natural" interpretive principle, clever reasoning abets rampant relativism. If the second principle actually has priority

because, in its procedural guise, it provides definitive interpretive guidance, then we need to be shown how this can be so.

D'Amato has developed his strong, "substantive" version of natural law and addressed the difficulties in Fuller's weaker teleological version in an important essay regrettably not reproduced in this volume.² Even there the problems just noted remain to vex the reader. Yet we do get a better sense of D'Amato's naturalism and, in passing, some unexpected light on D'Amato's otherwise obscure decision to divide the book into two unequal parts—the first given to descriptive analysis of the law, and the second to normative analysis. "Fuller did understand that 'natural law' indicates a *process* of legal interpretation that fuses the normative with the descriptive or empirical analysis of law."³ For Fuller the "normative" is to be found in "shared purposes"; for D'Amato, in substantive principles. Even if Fuller's position verges on relativism, the one aspect of it that D'Amato wants to keep is the process in which the normative and descriptive are fused. In Fuller's case, the interpreter's world view necessarily incorporates both elements and the process of fusing them is automatic. In D'Amato's case, nothing in the interpretive process prevents recourse to the wrong substantive principle. Process is not enough. D'Amato still needs an interpretive principle. If we look at D'Amato's interpretive efforts, we find no such principle, but we do find a proxy. Together with a description of consistent practices, D'Amato examines the pedigree of a putative rule—just as a positivist would. The clearest illustration is to be found in his recent major essay on the international status of human rights, which ought to have been published in this collection even at the cost of dropping some of the older, slighter essays (e.g., chs. 9, 10).⁴

What is D'Amato, then: reluctant realist, uncertain constructivist, confused naturalist, practicing positivist? That we cannot tell suggests that he does not know. It also suggests that contemporary jurisprudence in the United States has become so eclectic that nobody knows anymore. There is no reason to regret this condition so long as we try not to lie with labels and admit to our uncertainty. D'Amato, though, has difficulty in accepting this conclusion. Chronic uncertainty is the existential plight of our time. It suggests that we may be no more than "machines acting out what could be an absurd drama" (p. 219). This is D'Amato's deepest fear. It lends Kafkaesque resonance to the first sentence in the book: "The United States today is a dictatorship of law" (p. 1). D'Amato's determined efforts to unmask this absurd situation, in which law out of control is in control, confirms instead that even the best jurisprudential minds cannot make complete sense of the world we have constructed.

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² *Lon Fuller and Substantive Natural Law*, 36 AM. J. JURIS. 202 (1981).

³ *Id.* at 214 (his emphasis).

⁴ *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1127-47 (1982).

New Horizons of International Law and Developing Countries. Edited by S. K. Agrawala, T. S. Rama Rao and J. N. Saxena. Bombay: N. M. Tripathi Private Ltd., 1983. Pp. xxiii, 427. Rs.90.

New Perspectives and Conceptions of International Law: An Afro-European Dialogue. Edited by K. Ginther and W. Benedek. Vienna and New York: Springer-Verlag, 1983. Pp. ix, 261. DM 49.

The post-World War II era has witnessed sustained demands by jurists and spokesmen of the newly emergent nations and some concerned scholars of Europe and America for the restructuring of the concepts, institutions and scope of international law in order to address the realities and aspirations of a substantially expanded international community. These demands are predicated on doctrinal as well as pragmatic grounds. Some would deny universal juridical validity to an international legal system fashioned by a club of Western European states without the participation or consent of nations that lacked international legal personality by virtue of their colonial status. Others would question the contemporary legitimacy or functional efficacy of a body of doctrines and principles inspired by Western values that substantially sustained a colonial system or other unequal North-South power structures. Still others, eschewing ideological or doctrinal approaches, would adduce the pragmatic consideration that there can be no viable system of international law that does not enjoy the overwhelming support of the enlarged international community and would accordingly urge that contemporary international law must address and reflect the concerns and aspirations of developing countries, which represent the preponderant majority of the modern international community. According to this approach, the confines of traditional international law and the methodology for its study should be widened by new perspectives and new horizons unleashed by contemporary international developments. In the two books reviewed here, a group of Asian, African and Western scholars attempts to explore such horizons and perspectives.

New Horizons of International Law and Developing Countries is a compilation of papers presented by Indian international legal scholars to seminars organized by the Indian Branch of the International Law Association in 1977, 1979 and 1981. According to the introduction to this book, the seminars were inspired by the fundamental notion that

the legal philosophy permeating Western concepts did little justice to the aspirations of an awakening world outside the existing Western régimes. The orientation of the Western code was influenced . . . by the desire to preserve the Western power synthesis, which in turn, was identified with the dominance of exploitative economic interests.

The papers cover various themes considered pertinent to the concerns of developing countries: namely, human rights, international criminal law, the "New International Economic Order" (NIEO), the law of the sea, transnational corporations, and teaching and research in international law in India. The book claims that the developing countries have their distinctive problems, interests and approach with respect to these subjects. However,

the reader is bound to ask whether the book achieves the rather ambitious objective of demonstrating "how developing countries are thinking in regard to the manner in which contemporary international law seeks to service humanity in the quest for development and the preservation of peace."

Some of the essays do indeed articulate rather forcefully the perspectives of developing countries. Thus, A. K. Kuol's paper on the North-South dialogue and the NIEO offers a refreshing insight into the proper role of contemporary international law, which he portrays as a comprehensive system that is based, *inter alia*, on the principles of equity, sovereign equality and interdependent cooperation among states and is oriented towards the elimination of injustice and the reduction of inequities in the international system. The contributions of T. S. Rama Rao, V. S. Mani and B. S. Murty also provide a sophisticated analysis of developing-country perceptions of various human rights concepts.

But the reader who approaches every essay expecting to find a resounding statement of developing countries' viewpoints will be disappointed. Some of the essays are impressive analytical studies that have no pretensions to any regional bias and could easily have been written by mainstream international legal scholars from Europe or America. This is true of the contributions of S. K. Agrawala and D. N. Say to the section on international criminal law. The diversity of approach is further demonstrated by a number of papers that castigate developing-country strategies concerning the NIEO (see Rao on the NIEO).

One of the outstanding features of this book is the section on the law of the sea. Agrawala, Nageswara Rao, Surya Sharma, Wadegaonkar, Chauhan, T. S. Rama Rao, Dholakia and others present a penetrating analysis of major concepts in this area, in particular, the exclusive economic zone and resource jurisdiction, the determination of maritime frontiers and the delineation of maritime boundaries, continental shelf and exploration of seabed resources. The technical quality of this section and the historical perspectives brought to bear on the analysis stamp it as a major scholastic contribution.

The same cannot be said of the section on the NIEO. The contributions here are cluttered with a catalog of the resolutions and other political events relating to the establishment of an NIEO without a rigorous analysis of their legal implications.

While this book lacks a consistent all-pervading theme, it assembles an array of valuable insights into the dynamics of a changing international law, which scholars from other regions could profitably study.

New Perspectives and Conceptions of International Law: An Afro-European Dialogue consists of contributions of African and European scholars to a workshop held in Harare, Zimbabwe in 1982, and is more successful than its Indian counterpart in articulating an organizing theme. The book addresses three key areas: the New International Economic Order, human rights and national liberation in southern Africa. The contributions revolve around the basic thesis that "the transition of a eurocentric, status-quo oriented state system to a geocentric, development-oriented international system calls for a specific dynamic approach to international law."

In his introductory essay, Konrad Ginther elaborates this thesis by stressing

that a new configuration of world forces, in particular, decolonization and development, calls for a radical restructuring of the "theoretical edifice of international law." This requires, first, that more research be undertaken on the regional, subregional and national sociopolitical, economic and cultural framework within which internationally relevant legal change occurs, and second, that academic dialogue be restructured to allow the effective participation of those who are deeply involved in, and responsible for, decolonization and development.

The section on the NIEO begins with a general essay by Ann and Robert Seidman on the interaction between international law and political economy. The essay addresses two major questions: In what ways do the existing rules and processes of international law contribute to or cause the Third World's poverty? and How does international law structure the Third World's choices? In the process, the authors provide a provocative analysis of the economic and policy underpinnings of some of the well-known traditional legal concepts such as "prompt, adequate and effective compensation," technology transfer and inviolability of investment agreements, and suggest a research agenda on international law and development.

The African dimensions of the NIEO are treated comprehensively in the respective contributions of Nathaniel Masemola, Konrad Ginther and Wolfgang Benedek. Masemola analyzes the implications of the Lagos Plan of Action as well as African regional and subregional approaches to economic cooperation. Ginther discusses African regionalism and attempts at economic liberation as aspects of the NIEO, while Benedek dwells on the implications of interregional cooperation (Lomé II, Stabex) for the NIEO and for regional and subregional integration in Africa. The three essays provide an illuminating exposé of the impact of regional and subregional economic cooperation on emerging international law in Africa.

In his essay on the responsibility of states and transnational corporations for the violation of human rights in the Third World, Shadrack B. O. Gutto offers a wide-ranging critique of the role of transnational corporations as major actors in the old international economic order, but the reader will find the linkage between transnational corporations and human rights violations somewhat elusive. This essay, among other things, surveys recent international efforts at the regulation of transnational corporations and criticizes the "underconceptualisation" of transnational corporations in this exercise. In the author's view, states (capitalist) should be held responsible for the conduct of private corporations on the ground that *de facto* state control effectively converts such enterprises into public institutions. Codes of conduct are also faulted for not encompassing "quasi-state corporations" such as British Petroleum—a misstatement that will perhaps not be evident to a remote observer of the tortuous code negotiations.¹ Finally, the author makes the startling proposition that the codes should be applicable to all international agencies, including the United Nations. Whatever the theoretical possibilities may be for classifying international organizations as transnational

¹ While one of the major issues in the code negotiations has been the application of the code to state enterprises from socialist countries, there was never any doubt that the code would apply to state-owned enterprises in the West that operate transnationally.

corporations, the question may be raised whether there are not already in place adequate mechanisms buttressed by international agreements for regulating them.

The section on human rights presents an instructive discussion of African approaches to human rights and an exhaustive treatment of the provisions of the African Charter on Human and Peoples' Rights. S. Dayal surveys regional approaches generally, while O. Umozurike analyzes the provisions of the Charter and the state of human rights in various African countries with commendable candor. He concludes with the bold assertion that fundamental human rights have matured into matters of international concern and consequently no state can exclude international scrutiny of its human rights record on grounds of domestic jurisdiction. The contribution of Mikuin Balanda to this section is particularly instructive on the problems of implementing the Charter, while Benedek highlights the linkage between human rights and developmental issues under the Charter.

The peculiarly African perspectives of international law are brought into sharp relief in the section on national liberation in southern Africa. After a general introduction on international law and regional aggression by Reginald Austin, Ted S. Pekane examines apartheid and the legal status of national liberation movements. Pekane argues that the legality of the use of force by national liberation movements derives from the recognition by international law of the right of nations to self-determination. Where this right cannot be secured by peaceful means, other forms of struggle, including the use of force, become legitimate. Apartheid is itself a violent system that perpetuates itself by the brutalization of black South Africans and Namibians and by external aggression against neighboring African states. Since peaceful means have proved ineffectual for the dismantlement of apartheid and South Africa's illegal occupation of Namibia, the self-determination of the oppressed Africans can only be achieved by violent means. He reinforces his thesis by citing regional and international endorsement of the principle by the OAU, the nonaligned movement and the General Assembly of the United Nations.

J. C. Nkala's contribution specifically addresses the objections to this view and, in particular, the contention that the right to self-determination is only available to states and not to quasi-international persons like national liberation movements, and the proposition that the element of "armed attack" is missing in liberation wars. Nkala points out that these objections are rooted in blind adherence to traditional international law, which flies in the face of contemporary developments in international relations.

The book concludes with some reflections on a new approach to the study and teaching of international law, which is conceived of as an international law of development based on the human right to development. While this compilation of essays is not free of controversy as well as minor analytical defects and factual inaccuracies, on the whole, it provides a provocative and illuminating study, which students of contemporary international law and African affairs will find compelling.

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La Charte des Nations Unies. Under the direction of Jean-Pierre Cot and Alain Pellet. Paris: Economica; Brussels: Bruylant, 1985. Pp. xvi, 1553. Indexes. F.289.

This massive volume of 1,553 pages represents an article-by-article commentary on the Charter of the United Nations, organized under the supervision of Jean-Pierre Cot, professor at the University of Paris I (Panthéon-Sorbonne) and former minister, and Alain Pellet, a professor at the University of Paris-Nord and at the Political Studies Institute of Paris.

The impressive list of contributors includes the names of 82 prominent legal scholars, among whom are two former Presidents of the International Court of Justice, the Vice President and two judges of that distinguished tribunal, 11 officials of international organizations, four ambassadors at the United Nations, three members of the French Council of State, many prominent university professors and several former ministers of the Government of France. These contributors come from 17 different countries; they are all French speaking and they all profess to belong to the Latin juridical tradition.

In his preface, Javier Pérez de Cuéllar, Secretary-General of the United Nations, informs us that the book was prepared as a contribution to the commemoration of the 40th anniversary of the signing of the Charter of the United Nations on June 26, 1945. He also points out that its publication fills a real gap in that it constitutes the first systematic commentary on the Charter to come from the French school of juridical thought. To the well-known studies by Goodrich and Hambro and the daunting analyses of the redoubtable Hans Kelsen may now be added a French work of the highest standards, which will not only be useful to French-language users but will also be helpful to scholars from around the world who wish to familiarize themselves with an intellectual process and a means of expression that differ from those that are characteristic of Anglo-Saxon culture. As the Secretary-General notes, the great merit of these admirable commentaries lies in the fact that they explore and reflect on the current practices of the United Nations insofar as the interpretation of the Charter is concerned: they attempt to shed light, and indeed they shed a great deal of light, on the trends that have marked and will continue to influence the evolution of the Charter as the single most important document of contemporary international law and relations.

The book covers all 111 articles of the Charter. Each chapter, including one on the Preamble, contains the text of the article in question, a commentary by the author who contributed it and a valuable bibliography of books and articles for further study and research. Where appropriate, there is a separate chapter on each subsection of the major articles. On the average, each chapter runs from 5 to 15 pages. However, the more difficult provisions naturally receive more detailed consideration; for example, there are 19 pages on Article 2(7), 20 on Article 27, 26 on Article 51, 21 on Article 52 and 44 on Article 55.

After presenting its main commentaries, the book offers a fine contribution by Guy de Lacharrière, Vice President of the International Court of Justice, on *Lacunae or Coherence of the Charter*. This is followed by a brief but useful

note on linguistic aspects of the Charter. The volume ends with a "Selected Bibliography of General Works" (divided into six categories), an alphabetical topical index, a chronological index of conventions and resolutions cited, an index of jurisprudence, a table of acronyms and abbreviations, a general index and a note on the United Nations Association in France.

Illustrative, but merely illustrative, of the very high standards of virtually all the contributions is the rigorous examination of Article 2(4) by Michel Virally. In his introductory paragraphs, Professor Virally underlines the revolutionary changes that this article brought into traditional international law—so revolutionary, he adds, that it has proved to be very difficult indeed to give effect to the radical ambit that the article appears at first blush to have. Rightly emphasizing the essential need to consider Article 2(4) in the context of the Charter as a whole, Virally examines the familiar ambiguities that arise from the drafting of the article itself, from its links with the Declaration on Friendly Relations and from the shifting practices of the Security Council and the General Assembly. On the thorny problems of anticipatory self-defense, humanitarian intervention and the use of force in the struggle against colonial regimes, the author reaches conclusions that are not dissimilar to those of Schachter, Henkin and McDougal, but the panoramic path that he takes to get there is in marked contrast to theirs.

What readers of the *Journal* will want to know is that this major collection of essays is more, much more, than a mere description of each of the articles of the Charter. The book presents an analysis, in the best French tradition—clear, concise, beautifully organized—of the document as an entirety from a dynamic, modern perspective enriched by the diversity of viewpoints of judges, scholars, diplomats and practitioners. Bearing in mind that the last edition of Goodrich and Hambro did not take account of UN practice after 1965 and that the *Repertory* published by the United Nations itself, which is currently being reedited, will not cover events after 1978, it can be seen that the present collection by Cot and Pellet is the most up-to-date and complete study of the Charter now available.

The international lawyers of France are to be congratulated on a real tour de force. They have produced a volume that is astonishingly up-to-date, intellectually stimulating and of great practical value. They have also outdone their colleagues in most other countries in that they have contributed to the celebration of the 40th anniversary of the Organization in a way that will be widely recognized and increasingly appreciated for many years to come. No one dealing with the United Nations can afford to be without this splendid commentary.

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The Encyclopedia of the United Nations and International Agreements. By Edmund Jan Osmańczyk. Philadelphia and London: Taylor and Francis, 1985. Pp. xv, 1059. Indexes. \$160.

This useful reference work is the ambitious English-language version of an encyclopedia heretofore available only in a more abridged form, and

then only in Polish and Spanish. The title does not entirely do it justice; it is actually an encyclopedia of international affairs with particular emphasis on international organizations (not just the United Nations) and on multi-lateral treaties. Its scope is impressive, with more than seven thousand entries, including information on—and often the full texts of—more than three thousand international agreements and declarations. Some of the full texts, particularly of nontreaty declarations, are difficult to find elsewhere. Most of the entries conclude with citations to original or secondary sources.

The author is a journalist, not a lawyer. This has its advantages and disadvantages for the legally trained user. It is a more ecumenical work than a legal scholar would be likely to produce, reflecting the author's wide range of experience covering international events. This is an advantage, though the range of entries sometimes carries beyond items of abiding interest to international lawyers.¹ Some of the nonlegal entries are of considerable interest, including such things as the treatment of 20th-century German history and politics, the chronology of the energy crisis and a number of other historical outlines. Almost all entries, legal and nonlegal, are free from editorial comment or normative judgment.²

On the negative side, the author's lack of legal training or experience leads him into a number of errors and superficialities. When one reads, for example, that the Governing Body of the International Labour Organisation is composed of 40 members, including 10 each representing employers and labor and 20 representing governments, some further checking is in order. (There are 56 members; the respective figures for the three groups are 14, 14 and 28.) A comparable error appears in the entry on the International Monetary Fund. The very brief entry entitled "Optional Clause" is quite misleading. The entry on "Sanctions" gives an incomplete and somewhat misleading description of UN Security Council enforcement action. The list could go on. In general, the author's summaries of legal matters, including his summaries of treaties, statutes and judicial opinions, should not be taken at face value.

Most of the errors, however, are relatively minor. To list them all would be to give the unfair impression that the work is riddled with errors, when in fact the ratio of errors to entries is quite small. The point is that the reader needs to be on guard.

This observation compels the reviewer to insert some caveats about what is otherwise one of the real virtues of the book. The virtue is that it can serve not only as a quick reference tool for a researcher who has access to the original materials summarized or quoted in the book, but also as a collection of source materials for those who do not have access to well-stocked international law libraries. The generous use of full texts, and key excerpts from some texts not set out in full, makes the book a mini-library of source materials. There appear to be very few errors in the quoted texts themselves,

¹ One suspects, for example, that the international lawyer rarely will feel the need to look up such entries as "Coca-Cola," "Department Stores" and "Rugby."

² There are a few exceptions. One is in the entry on "Consensus," where the author gives his opinion on the utility of decision making by consensus in international organizations. He finds it to be indispensable.

as distinguished from the summaries of texts. The author, however, is not always careful to note whether or not the instruments quoted are in force. Some are not. Moreover, when the author makes the understandable decision to quote a lengthy text only in part, sometimes the omitted part is at least as important as the included part.³

The work contains some useful features in addition to those already mentioned. Thus, the reader who knows an organization or doctrine only by its acronym or popular title will be able to find it listed under that heading, or will be able at least to find it through a cross-reference. This can be a circuitous route if the reader starts by looking for the formal title,⁴ but any inconvenience is slight. For the reader who does not find what he or she wants simply by leafing through the alphabetically organized main body of the book, there are two indexes: a general index and a separate index of treaties. The reader looking for an introduction to the legal instruments and organizations in a specific field or region will often be able to find a relevant cluster of entries, such as the 13 pages of entries on various aspects of the inter-American system.

It would be astonishing to come across a reference work of this magnitude that contained no errors or omissions. Even though this book does not rise to such a breathtaking level, at the rather more fallible level of most human endeavor it is an impressive and useful effort. It is regrettable that its cost may put it out of the reach of many scholars and students who would benefit from having a personal copy close at hand for ready reference.

FREDERIC L. KIRGIS, JR.
Board of Editors

The Right to Life in International Law. Edited by B. G. Ramcharan. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xii, 371. Index. Dfl.175; \$57.50; £48.50.

The Hague Academy of International Law established a Centre for Research and Study in International Law and International Relations in 1957 that, within the bilingual tradition of the Hague Academy, brings together annually (in English and French sections) distinguished professors, senior researchers and other specialists in the field of international law from all parts of the world.¹ Their aim is to focus on current international legal problems. The editor of the book under review, who is an official of the UN

³ For example, the author omits the procedural provisions of the American and European Conventions on Human Rights, and includes only one of the protocols to the European Convention.

⁴ A reader looking for the European Economic Community Treaty, for example, would find it (actually, its first 136 articles) under the heading, "Rome Treaty, 1957." There is a cross-reference, though, under "European Economic Community, EEC."

¹ For a very enlightening account of the activities of the Research Centre, see the article by Dr. B. Boutros-Ghali under the title *Le Centre d'étude et de recherche de droit international et de relations internationales de l'Académie de droit international de La Haye*, in JUBILEE BOOK 1923-1973, at 139-57 (Hague Academy 1973).

Centre for Human Rights, directed the English section in 1983. He presents the reader with a collection of essays written mainly by participants in that section, but adds a few relevant articles submitted by outsiders.

The editor, in his presentation of the different essays, clearly shows that, in his opinion, all human rights are indivisible (as acknowledged for the first time by the UN General Assembly in its Resolution 32/130 of December 16, 1977) and actually culminate in the right to life. Indeed, a number of authors *expressis verbis* state that all other human rights become meaningless if the basic right to life is not duly protected. The book can be divided into three parts: chapters I and II deal with international standard setting with respect to the right to life (part I); chapters III-V and VII-IX consider the effective realization of the right to life (part II); and chapters X-XIII reconstruct in an analytical way the guarantees adopted by the international community to prevent undue deprivation of the right to life (part III). Chapter VI, a short note on genocide, could have been placed in part III.

The book opens with a contribution by the editor on the concept and dimensions of the right to life, which, with minor editorial changes, has already appeared elsewhere.² The underlying philosophy of Dr. Ramcharan is to enlarge the effective protection of human rights by means of an extended and open-ended interpretation of existing treaty texts, as opposed to the traditional approach, which limited human rights protection in view of state sovereignty. In order to give a dynamic dimension to the right to life, he attaches a 37-point agenda for future action, which clearly puts a positive obligation upon states. Each country should establish a minimum protection and control system to ensure respect for the right to life and it is obvious that governments should be held responsible if they fail to do so.

The drafting history of the main treaty provisions pertaining to the right to life considered in the next chapter shows that regional standard setting and implementation play a pivotal role in standard setting and implementation at the universal level and may be even more refined: to date, the inter-American human rights system is the only one that protects human life from the moment of conception.

The contributions by the editor on the drafting history of Article 6 of the Covenant on Civil and Political Rights and Article 2 of the European Convention on Human Rights are proof of solid legal craftsmanship (and the chart on page 46 provides a useful compilation of documentary references). It becomes only too clear that conflicts, largely between East and West, necessitated compromises that in turn not only eroded the right in question, but also introduced uncertainties in the scope of the right.

Chapters III-V bear witness to the socioeconomic dimensions that are nowadays considered as a necessary corollary for a full realization of the right to life. The article by Dr. Menghistu, *The Satisfaction of Survival Requirements*, puts the right to life in its economic perspective: the right to live a decent life. The author supports his analysis with the general comment by the Human Rights Committee on Article 6 of the Covenant on Civil and

² 30 NETH. INT'L L. REV. 297-319 (1983).

Political Rights.³ He contends that the obligation to comply and meet the survival requirements is a first priority for the state concerned (p. 80) and that the international community should assume a residual responsibility through international cooperation. Coming himself from a developing country, he squarely puts the blame for not meeting these survival requirements on governments and draws the inescapable conclusion that respect for human rights to a large extent depends on the existence of a democracy.

Professor de Waart contributes an article on the interrelationship between the right to life and the right to development. Here the reader is plunged into a vivid discussion of the concept of third generation or solidarity rights, the need to establish the "New International Economic Order" and the question of collective versus individual human rights.

The article by Dr. Tikhonov on *The Inter-Relationship Between the Right to Life and the Right to Peace: Nuclear Weapons and Other Weapons of Mass-destruction and the Right to Life* was written after the adoption of UN General Assembly Resolution 37/16 of November 16, 1982, which designated 1986 as the International Year of Peace. The author contends that the right to peace adds a new dimension to the right to life, although he does not take a definite position on whether he accepts or rejects the concept of solidarity rights. The formulation "Habeas Corpus and other constitutional instruments" (p. 99) may cause the reader to confuse the procedural role of habeas corpus and the "Habeas Corpus Act," the constitutional guarantee of personal liberty.⁴

The outstanding article by Professor Gormley on *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens* reflects his impressive knowledge of international law. In his very analytical but, by the same token, concise survey, documented with a wealth of footnotes, he traces the evolution of the norm in the International Law Commission, its codification in the Vienna Convention on the Law of Treaties and its application by the International Court of Justice. Norms of *jus cogens* and rights *erga omnes* are proof of the existence of a hierarchy of norms in the international legal system that will direct a higher degree of recognition and protection to the right to life. However, in the author's opinion, "the ever present problem remains one of achieving recognition by the international community through the application of *jus cogens*" (p. 124). Consequently, international public policy becomes the umbrella concept (together with social justice) within which *jus cogens* serves as an indispensable element (pp. 128, 147).

The *travaux préparatoires* of Article 2 of the International Covenant on Civil and Political Rights clearly demonstrate the ongoing dispute between

³ The Human Rights Committee stated in 1982:

The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. In this connection, the Committee considers it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics [pp. 66-67].

37 UN GAOR Supp. (No. 40) at 93, UN Doc. A/37/40 (1982).

⁴ See BLACK'S LAW DICTIONARY 837 (4th rev. ed. 1968).

the concepts of monism and dualism in international law (chapter VIII on the obligations to respect and to ensure the right to life, p. 162). Chapter IX on the "Protection of the Right to Life by Law and by Other Means" is a methodological analysis of all the relevant aspects of the right to life considered at the Hague Academy session and can therefore be conceived of as a synthesis of the book. Dr. Redelbach distinguishes between the clause of nonderogability of the right to life, which could be considered as the *formal* (emphasis in the original) protective element included in the obligation of states under international law, and the norm of *jus cogens*, which could be considered the *material* (emphasis in the original) protective element (p. 186).

Part III of the book thoroughly reviews the attempts by the international community to curtail the arbitrary deprivation of life. Chapter X deals with the concept itself and then analyzes controls on permissible deprivations. Authors C. K. Boyle and D. D. Nsereko amply demonstrate that they have mastered the topic, although chapter XI is marred by two unfortunate typographical errors.⁵

Moreover, the reviewer wonders why the last contribution, by Professor Weissbrodt on international measures against arbitrary or summary killings by governments, does not follow chapter XI.

The contribution by Sapienza (ch. XII) examines international legal standards on capital punishment, in particular the legal deprivation of the right to life.

Considering the difficulty of being author and editor at the same time, Ramcharan can be congratulated on this book and its very relevant annexes. It is the first in-depth evaluation of the right to life as it exists in customary international law and continues to be codified in international conventions; as such, it is a major contribution to international human rights law. However, it should be mentioned that the editor benefited from the wisdom of a group of outstanding experts in the field, who in turn were guided by an excellent bibliography prepared by the library of the Peace Palace. The present reviewer also drew heavily upon that bibliography while coordinating the French section.⁶

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The Prevention of Genocide. By Leo Kuper. New Haven and London: Yale University Press, 1986. Pp. ix, 286. Index. \$22.

The Nuremberg trials of German war criminals presented incontestable proof that millions of innocent men, women and children had deliberately been annihilated as part of a systematic program to extirpate the Jews from

⁵ The word "Cross" is missing after "International Committee of the Red" (p. 267) and the Third Geneva Convention Relating to the Treatment of Prisoners of War was signed in 1949, not in 1948 (p. 270).

⁶ See J. G. C. VAN AGGELEN, *LE RÔLE DES ORGANISATIONS INTERNATIONALES DANS LA PROTECTION DU DROIT À LA VIE* (1986).

Europe. Gypsies and Slavs suffered a similar fate. Dr. Raphael Lemkin, a jurist who had fled Poland, coined the term "genocide" to describe the wanton murder of a whole people. Despite universal denunciation of the offense, Professor Leo Kuper concludes that genocide remains a crime without punishment. In this, his second book on the subject, the author suggests what can realistically be done to prevent the recurrence of outrageous acts of inhumanity.

At its first session, the General Assembly of the United Nations—by unanimous vote—resolved to prevent and punish the crime of genocide; within 2 years, a convention was ready for ratification. By that time, however, Cold War rivalries dominated international attention. Whereas the first draft of the convention provided for an international court and universal jurisdiction, the final text was a watered-down compromise. The definition of genocide contained vague clauses: "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"; "causing serious bodily or mental harm to members of the group." Political groups—those most likely to need protection—were not covered. Furthermore, it was left completely to the discretion of signatories whether to accept the jurisdiction of any international criminal court. Since genocide almost invariably requires the complicity of a state, and no nation can be expected to indict itself, it is little wonder that "genocides were a continuing phenomenon of our times and that there was virtually no protection against the crime" (p. vii).

Focusing on "domestic genocides" rather than on those arising during international warfare, Kuper refers to the mass murders by Idi Amin of Uganda—who has never been tried—and the millions driven to death by Pol Pot—whom the United Nations still recognizes as the legitimate head of Kampuchea. The inherent weakness of the United Nations is further illustrated by the failure to implement antislavery conventions. Difficulties are exacerbated by disparate values and norms in capitalist, socialist and Third World countries. The mass killings in Bangladesh reflected the paralyzing effect of conflicting legal principles: the right to self-determination vis-à-vis a state's right to territorial integrity, or the right of noninterference in internal affairs vs. humanitarian intervention. Too frequently, nations put *raison d'état* above their concern for human life.

The need for a reformed structure of international society is acknowledged, but Kuper's approach to preventing mass murder is a more immediate and pragmatic one. Noting their positive impact in helping to curb "disappearances" in Latin America, he appeals to nongovernmental and other organizations such as Amnesty International and the International Commission of Jurists to alert the world to threats of genocide before it becomes a reality. He recognizes that the United Nations must play a key role and he urges that complaints of human rights abuses continue to be submitted to competent organs of the world organization. Invoking courts of human rights may be useful and the appointment of a special High Commissioner for Human Rights is recommended. Public disclosure of wrongdoing, he says, may serve as "a modern and genteel equivalent of the pillory and stocks of other days" (p. 180). Lists of suspected criminals should be published

until nations are ready to accept an international penal tribunal—"an essential element in any serious campaign for the punishment of the crime of genocide" (*id.*). Until criminals can be tried in a proper court, tribunals of concerned citizens may play a useful educational role. In short, Kuper looks to the power of aroused public opinion as an immediate means of helping to prevent genocide and similar crimes against humanity.

As used in this book, the term "genocide" is given a much broader interpretation than was intended by Raphael Lemkin. Kuper's arguments are directed against mass murders of political opponents, terrorism, apartheid and a wide array of similar inhumanities. Indeed, the epilogue's reference to "the general intellectual and moral absurdity of the nuclear arms race" (p. 232) suggests that nuclear warfare would be the ultimate act of genocide. One hopes that this broad sweep will encourage greater enthusiasm for the formulation of the Code of Offences against the Peace and Security of Mankind, which is now being drafted by the International Law Commission, and that it will persuade the readers that if international crimes are to be punished and deterred, an international criminal court must be established.

It is a tragic irony that although nearly one hundred nations have seen fit to do so, the United States—which led the world in the protection of human rights—has not yet ratified the Genocide Convention. On February 19, 1986, by a vote of 83 to 11, the Senate advised and consented to ratification but its consent was subject to two reservations and five understandings that significantly weakened the already flawed instrument. Furthermore, the President was prohibited from depositing the ratification until additional implementing legislation is enacted by the Congress.¹ Despite these serious shortcomings, ratification should not be further delayed. The goals and recommendations of Kuper's book merit public approval. The Genocide Convention is a memorial to the sacred memory of all those who were victims of genocidal slaughter and an important symbol of support for the most fundamental of human rights objectives.

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Droit International de la Santé. By Michel Bélanger. Paris: Economica, 1983.
Pp. 336. Indexes. F.125.

A large part of the world's population suffers from poor health or a lack of health-related services. The author of this book points out that each year 5 million Third World children die of six readily preventable diseases: whooping cough, diphtheria, polio, German measles, tetanus and tuberculosis. Poor and aged persons lack health care in developed countries as well. The author estimates that 3.2 billion people do not have any regular access to ordinary health care.

¹ See 79 AJIL 116-29 (1985); 132 CONG. REC. S1378 (daily ed. Feb. 19, 1986).

The book addresses problems of world health from the perspective of law. One goal of the book is to examine the body of international and domestic regulations that constitute "the international law of health care" (p. 10). In approaching his task, the author emphasizes the political and social depth of his subject. International health law is an important strand of international human rights law. It finds its roots, for example, in Article 25 of the Universal Declaration of Human Rights. "The right to health is considered a fundamental right," he affirms (p. 40).

Yet, if there is such a right to health, one must ask how is it to be realized? Certainly, it is wide of the mark to insist that one can "abolish disease by decree." In place of such a chimerical notion, the author offers a practical role for law—to assure people *access* to health care. He proposes that such a right "is rather a twin moral obligation: each individual should be held to preserve his own health, while the state should furnish to each person access . . . to health services . . . and at the same time, if necessary, the state should take persuasive . . . or coercive measures . . . to protect individual health" (p. 42).

The book surveys the international organizations that play a role in regulating and delivering certain health services. The World Health Organization (WHO), for example, plays a "quasi-regulatory" role in organizing certain health services. This role appears in international cooperation to control epidemic diseases. Nations that are members of WHO are obliged to adopt implementing measures when the organization has established recommendations. The book also examines the activities of nongovernmental organizations such as the International Red Cross.

The role of law is complex. Regulations established by WHO do become a part of the fabric of traditional enforceable law through domestic legislation and enforcement. In addition, the international legal norms serve as guidance or general encouragement toward standardization and the assurance that health care will be widely available. In this sense, they are "soft" law because they exhort improvement of the human condition. In this larger movement to improve conditions, the international institutions plunge into the realm of politics. The question of effectively expanding health care is in fact part of a worldwide examination of questions concerning a new economic order. "Today, more precisely, one must consider [the international law of health] as part of international economic law, notably, part of the international law of development" (p. 10).

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Human Rights: An International and Comparative Law Bibliography. Compiled and edited by Julian R. Friedman and Marc I. Sherman. Westport and London: Greenwood Press, 1985. Pp. xxvii, 868. Indexes. \$75.

Intended as a "comprehensive and professional bibliography devoted to the international and comparative law of human rights," this volume is a

welcome and essential tool for research in international human rights. Indispensable for law libraries, the work should be purchased by all institutions concerned with the study of human rights, as it provides a significant number of citations to works in law-related disciplines. The bibliography contains 4,306 citations in over 20 languages, drawn from a broad variety of scholarly sources, including the expected monographs, journal articles, collections of articles and yearbooks. It also includes dissertations, conference reports and compilations of documents. In addition to its broad coverage of academic sources, the bibliography makes an important contribution by providing access to the human rights documentation of international organizations. It includes a wide range of reports and studies produced by international intergovernmental organizations (IGOs), the relevant publications and documents of UN bodies and some publications of nongovernmental organizations (NGOs). At present, this material is scattered in various indexes and bibliographies and is difficult to locate. This reviewer was repeatedly impressed by citations to such "gray literature"—hard-to-find, but often essential, documents and publications of international organizations.

A useful complement to the broad source coverage of the bibliography is its clear statement of the criteria used to include or exclude items. Friedman notes in the introduction that three key terms—human rights, international law and comparative law—were used as selectors to determine pertinent citations. In defining the scope of the term "human rights," the authors relied upon the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, regional human rights instruments and other documents from international organizations.

The authors are sensitive to the danger of an excessively Eurocentric or Western approach to the literature on human rights, noting the importance of the bibliography's comparative law perspective. Thus, the bibliography includes works that treat human rights concepts from the perspective of different legal systems, and that give the bibliography a broad geographic and linguistic base. To assure sufficient representation of African, Asian, Oceanic and Latin American sources and of works from the Soviet Union and Eastern Europe, the compilers used an open-ended time frame for these items. With the exception of seminal writings on subjects that are unduly lacking in publications, the compilers have restricted Western European and American sources to the period 1965–1983.

The inclusion of citations to documents and publications of international organizations, especially IGOs, increases the likelihood that Third World positions on the international law of human rights will be adequately represented in the bibliography since these sources convey a great deal of information on Third World conceptualizations of human rights and human rights policies. With some exceptions, however, the bibliography does not include citations to the reports and publications of human rights nongovernmental organizations, sources that have become increasingly important in current research and in policy debates on human rights, and that often do the best job of documenting actual human rights practices in many states.

Nonlegal materials are included where they "sharply illuminate some important aspect of human rights pertinent to international and comparative law." The bibliography thus contains relevant items from disciplines such as theology and religion, philosophy, political theory, social science and social policy. In light of recent controversies concerning the universality or cultural contingency of human rights, the inclusion of works such as these may help to clarify divergent conceptions and interpretations of international human rights instruments that derive from differences in cultural, historical or political contexts.

The approach taken to sources is quite distinct from that used by the compilers of the smaller human rights bibliography produced a few years ago by Columbia University's Center for the Study of Human Rights.¹ That bibliography confined itself to English-language scholarly works of the sort likely to be found in most university and large public libraries; it thus excluded the publications of IGOs, and, of course, all non-English-language works. A comparison of several sections covering similar topics in both bibliographies reveals a strikingly low degree of overlap. My impression is that the Columbia bibliography includes a wider range of nonlegal sources, and more works dealing with topics in the U.S. context.

In the Friedman/Sherman bibliography, citations are arranged alphabetically by topic under two main sections, "Rights" and "Institutions." The rights section includes topics mentioned explicitly in the various international human rights instruments. It also includes populations usually singled out as victims of human rights abuses, e.g., women, children, aliens and minorities. Under "Institutions" are not only the various human rights forums and organs, but also procedures ("Fact Finding"), doctrines ("Individual in International Law") and practices ("Apartheid"). The sections occasionally overlap, which sometimes necessitates a check in at least two places for relevant citations. A secondary subject index helps to some extent, indicating citations that fall into two or more categories in the main body of the bibliography. For example, instead of having to scan the rather long topic section entitled "Equality of Treatment" for works on education, the secondary subject index points the user to works in the section that treat education.

The approach to subject headings taken in the Columbia bibliography seems superior to that used in the present work. The Columbia arrangement more closely tracks the rights mentioned in the major human rights instruments, and generally provides a more detailed subject arrangement, with cross-references. In the Friedman/Sherman bibliography, subject headings are sometimes confusing, and often too broad. For example, the heading "Social Rights" appears, but there is no "Economic Rights" heading. A general "Economic and Social Rights" heading would have been more appropriate, with subsections on the specific rights, as the Covenant does not in terms distinguish between economic and social rights. One of the overly broad headings is "International Covenant on Civil and Political Rights/International Covenant on Economic, Social and Cultural Rights." The large

¹ HUMAN RIGHTS: A TOPICAL BIBLIOGRAPHY (J. P. Martin ed. 1983).

number of citations under this rubric, the structure of the literature, which usually treats one or the other Covenant separately, and the needs of most users warrant two separate headings. However, the Friedman/Sherman bibliography provides easier access than the Columbia volume to works on the major international human rights bodies, with headings such as "UNESCO," "ILO," "OAS," "UNHCR," "U.N. Human Rights Commission" and so on.

A unique feature of the bibliography is its inclusion of the decisions and pleadings of the European Court of Human Rights under relevant topics. Although this material is already fairly accessible through the *Yearbook of the European Convention on Human Rights* and the recently completed *Digest of Strasbourg Case-Law relating to the European Convention on Human Rights*, its publication here is convenient.

An author index lists corporate as well as individual authors, providing convenient access to many of the documents of international organizations listed. Absent, however, is a geographic index, although the "Institutions" section at the beginning of the volume has the topic heading "Africa."

An extremely useful feature of the bibliography is its "Source Guide," which includes the principal sources used in the preparation of the bibliography, additional titles relevant to the international and comparative law of human rights, and selected textbooks on international law and organization. The source guide, providing a list of bibliographies, documentary compilations, anthologies, dictionaries, human rights periodicals and newsletters, yearbooks, legal periodical and periodical indexes, and major publications of, and textbooks on, international organizations, as well as a section on computer-readable data bases, is itself a bibliography useful for creating or evaluating a human rights law collection.

The scope and coverage of the bibliography are excellent; its shortcomings in terms of arrangement of and access to materials are not serious. (For example, a curious omission from the Friedman/Sherman bibliography is a section on the right to political participation.) Given that the bibliography was computer-produced, however, it is unfortunate that it has not been mounted as an on-line data base, which would cure many of the ills of subject access to which printed bibliographies are heir.

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Law and the Cultural Heritage. Volume I: Discovery and Excavation. By P. J. O'Keefe and Lyndel V. Prott. Abingdon, England: Professional Books Limited, 1984. Pp. xxvii, 434. Index. \$39, cloth; \$25.50, paper.

Le Trafic illicite des biens culturels et leur restitution. By Ridha Fraoua. Fribourg: Editions Universitaires Fribourg Suisse, 1985. Pp. viii, 279. Sw.F.56.

In less than a generation, a rather new body of international cultural heritage law has been leaving substantial imprints on human affairs, including

international relations. In the words of Patrick O'Keefe and Lyndel Prott, this body of law "is evolving into a whole new discipline and . . . much further change is pending." It is a subject of both practical and academic importance: the 1986 Philip C. Jessup International Law Moot Court Competition (sponsored by the American Society of International Law), which was addressed to major issues within the new discipline, celebrated its coming of age.

Each of the books reviewed here contributes to an understanding of international cultural heritage law, as well as to its development. O'Keefe and Prott, both of the University of Sydney, have produced the first of what promises to be a definitive, five-volume treatise. Fraoua, in the published version of a doctoral dissertation, has written a useful introduction to the subject, with emphasis on the principle of restitution, including a set of recommendations designed to strengthen it. Together, the books examine the legal aspects of cultural property whether lost, found, removed (often illegally), lost again (to national patrimonies) or regainable/regained.

The O'Keefe and Prott study is monumental, an adjective used advisedly but not technically. The authors plan to publish further volumes on the creation and preservation of cultural objects (or "relics"), their transnational movement, the immovable heritage (monuments and sites) and the impact of the new body of law on basic principles of property, criminal and procedural law. Like other scholars in this new field, O'Keefe and Prott acknowledge that they were inspired initially by an interest in the transnational movement of cultural property. Unlike others, however, they did not stop there. Instead, they have explored the whole field of municipal and international law as it involves the handling of relics. The authors bring to their work a treasure of academic and practical credentials in governmental work, the law of underwater archaeology, comparative law, and jurisprudence, as well as a personal affinity for cultural property.

Although volume I may be less useful to international lawyers than those still to be published in the series, it amply supports the authors' expressed conviction that the practice and development of the new discipline requires a comprehensive understanding of both municipal and international protections of cultural property at its geographical source. Volume I's treatment of municipal laws offers a comparative basis for reconciling national interests with fundamental objectives of the emerging international regime. For example, comparative study will assist states in implementing preambulatory provisions of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. These provisions include the obligation of "every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export" and the necessity of organizing the protection of the global cultural heritage "both nationally and internationally among States working in close co-operation."

Leaving no obvious stone unturned, the authors have summarized and analyzed documentation from almost four hundred jurisdictions, including not only current and historical legislation but also supplementary material, from Aargau to Zimbabwe, Alaska to Tierra del Fuego. The book also con-

tains a brief introduction and several references to international authority, most notably the several UNESCO conventions and recommendations. It is expected that the remaining volumes will examine international documentation in greater detail. To aid the reader in unearthing information, the material is carefully arranged. For example, on the subject of controlling excavation and discovery, "reporting" requirements are divided into subcategories of time limit(s), persons liable to report, public awareness, where to report, what to report, interim protection, sanctions for nonreporting and marking. At the end of the book is a convenient bibliography of municipal legislation and international legal instruments, followed by a good index.

This compendium will be an invaluable research tool. The reviewer well remembers the state of the art as recently as 1969 when, as a fledgling Fellow of the American Society of International Law and panel reporter-at-large, he set about to prepare a Report on Municipal Legal Responses to the International Movement of National Art Treasures. The resulting study, drawn from scattered archives and desk drawers, totaled just 44 pages. Later, a more extensive summary of municipal legislation by Bonnie Burnham for the International Council of Museums (ICOM) greatly assisted investigations, as has an ongoing compilation of legislation by UNESCO. O'Keefe and Prott's study, however, will almost certainly be the best, if not the last, analytic word on the subject of international cultural heritage law. Not finding any pockets inside the back cover, one only hopes that the study will be kept current even as one awaits the publication of the remaining four volumes.

Fraoua's less ambitious book is also useful. It provides a comprehensive summary of law bearing on the restitution of cultural property, followed by several detailed recommendations for strengthening the principle of restitution. Today, as more and more countries seek to reclaim parts of their cultural patrimony from foreign possession—largely the legacy of colonialism and the incapacity of many culturally rich countries to protect their patrimonies—claims for the return, restitution and forfeiture of cultural property raise especially important issues. The concept of restitution, however, is as controversial in scope and content as it is accepted in theory (witness the ambiguity within a single line of UN General Assembly resolutions on the subject). Fraoua seeks to clarify the concept. After describing pertinent features in the broad field of cultural heritage law, the book argues that the concept of restitution, although rather ambiguous, is a principle of law in need of development, and that there is already some flesh on the bone. Specifically, the book appears to endorse the idea of a common cultural heritage of mankind, defined in such a way as to take account of truly *significant* sovereign claims on behalf of national patrimonies. The author favors a limited regime of restitution that would strengthen, but not exaggerate, the legal effect of municipal export controls and certification. A limited regime based on a balanced evaluation of sovereign claims seems preferable to one that would require states automatically to give effect to any and all antiquities and export laws of other states. Overly stringent requirements, such as those found in the San Salvador Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations,

are simply unrealistic. Although Fraoua shows some sympathy with such measures, he stops short, quite wisely, of relying on the rather extravagant claim made in an ICOM study that the restitution of cultural property to countries of origin is *jus cogens*.

Overall, the author's brief for developing the international law of restitution in the form of an international convention is appealing, if a little incomplete at this early stage. On a theory of leaving well enough alone, one might question the author's recommendation to amend existing treaty law in order to strengthen the principle of restitution, and one might wish the author had devoted more attention to means, legal and otherwise, to encourage voluntary returns, long-term loans and other substitutes for permanent acquisition of cultural property.

In developing his thesis, Fraoua understandably relies for a description of municipal legislation on the ICOM summary and the already somewhat outdated French version of the UNESCO compilation. Although these were once current, they often conflict today with the up-to-date sources identified and discussed by O'Keefe and Prott, particularly in citation and phraseology, but also in substance. Changes during the last decade or so, such as in the Chinese legislation, therefore affect the accuracy of some statements.

Fraoua provides a compact treatment of private international law, including the often disappointing rule of *lex rei sitae* and several landmark judicial opinions. Here, as elsewhere, the author's organization and writing style are clear. Even the apprehensive reader of French will find the going easy. A short précis in English at the end of the text, although it may help orient the reader, does not, however, do justice to the author's achievements. Also, the book's usefulness as a reference tool is somewhat limited by the lack of an index. Generally, though, *Le Trafic illicite* provides a good introduction to a new discipline and a glimpse, perhaps, of the pending change that O'Keefe and Prott have forecast in their treatise.

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Without Justice for All: The Constitutional Rights of Aliens. By Elizabeth Hull.
Westport and London: Greenwood Press, 1985. Pp. xi, 244. Index.
\$29.95.

In this little volume, Elizabeth Hull has compressed two centuries of American immigration history into a useful, well-written plea for reform of U.S. immigration law and policy. She offers a brief on behalf of aliens, contending that their legal rights should be significantly expanded. As advocacy, Hull's book is forceful and eloquent. As scholarly analysis, however, it lacks both balance and a taste for complexity. Its highly tendentious preachings will appeal mostly to the already-converted.

Hull's position is best illuminated (in a very brief review) by considering three of her underlying assumptions and recurring themes. Each is doubtful

or at least highly controversial, yet the author subjects none of them to careful examination or even much discussion. First, she seems to argue that all aliens, regardless of legal status or permanency of residence here, should enjoy the same legal entitlements, and that these entitlements should be identical to those already possessed by citizens. Current law, which accords greater constitutional rights to aliens who have succeeded in entering the United States clandestinely (or remain in it illegally) than to those who have presented themselves for inspection at the border, has sometimes been criticized for employing illogical, perverse and morally incoherent distinctions. Regrettably, however, Hull seems uninterested in making such a critique or in suggesting more defensible distinctions—based, perhaps, on the legality of the alien's entry, his length of time in the United States, or some rough qualitative assessment of the interests at stake. Hull prefers a radically undifferentiated approach to aliens' rights, one that appears to reject line drawing altogether. To her, the law should accord the long-term permanent resident and the individual who has just crossed the border illegally identical procedural protection. This novel assumption, to say the very least, requires a defense, yet none—other than reflexive invocations of a potentially empty equality principle—is supplied.

A second, related theme is that insofar as procedural rights are concerned, more is better. From reading Hull's account, one would not guess that American law already provides even the excludable alien with more extensive procedural protections than any other legal system in the world, or that the constitutional standards whose inadequacy Hull criticizes have long been augmented by statutory and administrative procedural rights. Nor does her book encourage one to question whether, as she assumes, the criminal justice system is a suitable procedural model for adjudicating the status of the vast majority of excludable and deportable aliens, more than 1 million strong, who enter a resource-poor administrative system each year. Her discussion does not seriously consider the fact that additional procedures are not "free," even in nonmonetary terms, but instead, often entail complex, morally ambiguous choices. These involve trade-offs, for example, between long-term detention and mass releases of excludable aliens, and between procedures that encourage erroneous exclusions and those that facilitate erroneous admissions. Hull not only fails to clarify these choices; she seems not to recognize their existence. That her proposed reforms might render them even more poignant utterly escapes her notice.

Third, she asserts that the problem of justice for aliens can be substantially ameliorated by abandoning "two dangerous abstractions"—citizenship and sovereignty. Apparently, she regards this rather far-reaching proposition as self-evident, for she does not find it necessary to tell the reader how such fundamental changes could be accomplished, how they would affect the behavior of individuals and nations, what new injustices they might create or what evidence there is to support her optimistic predictions. In a similar if less abstract vein, she views increased economic assistance to source countries and stronger enforcement of worker protection laws, rather than employer sanctions, as the best answers to illegal migration. Yet these proposals

ignore a host of theoretical and practical difficulties. These include the often tenuous connection between such assistance and sound, long-term economic development, and the likelihood that local economic development would encourage, rather than retard, migration to the United States. Hull closes her book with a rhetorical question that indicates her belief that "closed borders" (the term is undefined) are morally indefensible. Again, however, she fails to advance any justification for that highly idiosyncratic view.

Despite its glaring analytical weaknesses, Hull's book does possess some solid virtues. Her introductory chapter, presenting a historical overview of American immigration policy, is a valuable summary of a complex, poorly understood evolution. Her criticisms of Immigration and Naturalization Service bonding practices, ideological exclusions and certain state law discriminations against aliens are telling, while her proposals for reforming the asylum adjudication process make important, if by now familiar, points.

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Guidelines for International Election Observing. Prepared by Larry Garber. Washington: The International Human Rights Law Group, 1984. Pp. iii, 101. \$7.95.

On-site monitoring of controversial elections, like human rights fact-finding in general, has proliferated in recent years. The 1984 election in El Salvador was observed by 26 official missions from other countries as well as numerous nongovernmental organizations. This growth in activity is largely due to increasing recognition of the role such missions can play in promoting human rights in all countries. Yet if these missions are to succeed, practical guidelines are needed to ensure the impartiality and credibility of the findings. Lack of a uniform methodology and the application of varying criteria for evaluating electoral processes have led to widely contradictory reports regarding several recently monitored elections, undermining the contribution to human rights that might have been achieved.

The International Human Rights Law Group has performed an invaluable service by drafting guidelines for observing international elections and publishing them in part 1 of this book, with detailed commentaries following each recommendation. They should be essential reading for every organization undertaking observer missions and every observer asked to participate in such an activity.

The guidelines are based upon extensive experience in fact-finding missions by those who contributed to their preparation. As a result, the guide contains a wealth of practical information that can be expected to improve the standards of election observer missions and enable organizations to avoid many mistakes in preparing and sending such missions. The guidelines do not avoid such controversial topics as whether observers should be sent to elections whose legitimacy is questioned because not all parties are participating in the process and whether the sponsoring organization should accept

financing from the country whose elections are being observed. While some organizations may disagree with the conclusions reached, it is an important contribution that the guidelines ensure consideration of these and other issues.

The appendixes following the guidelines are nearly as valuable as the guidelines themselves. They contain relevant provisions of human rights instruments, sample terms of reference of past missions, outlines and forms for use by observers, suggestions for organizing an election observer mission and additional guidelines for in-depth analysis of an electoral process.

Part 2 of the book is a summary of papers and contributions from a May 1984 conference on international monitoring of elections. These are uneven and often repetitive of material found in the earlier guidelines. Indeed, some of the material could be considered to be filler. Nonetheless, there are some interesting and valuable discussions by observers of their experiences monitoring past elections and suggestions for institutional procedures, which make the proceedings worth including with the guidelines as additional commentary. As for the guidelines themselves: "Don't leave home without them."

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L'Invasion Turque à Chypre du point de vue du droit international. By D. S. Constantopoulos. Thessaloniki, 1983. Pp. 58. Index.

For those who need reminding of the sequence of events that led to the Turkish invasion of Cyprus in 1974 and the subsequent division of the island into Greek and Turkish administrations, this small pamphlet by Professor Constantopoulos should prove of value. While much of his analysis is based on Turkish documents and proclamations, it cannot be denied that the bias is undoubtedly Greek.

In the first instance, the Turkish Government based its claim to intervene on the rights it alleged as belonging to it under the tripartite Treaty of Guarantee, which provides that "in so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty," that is to say, an independent Cyprus regulated by the Basic Articles of its Constitution. Turkey maintained that its action was essential to restoring order, which was stated to have been endangered by the coup against Makarios. Both the author and the Greek Government deny that this provision opens the way to unilateral intervention. He also implies (p. 11) that, whatever the Treaty provides, any such intervention would be in breach of the United Nations Charter. If this should be the case, it might well mean that the Treaty of Guarantee from the beginning lacked any real validity, for "toute restriction de la Souveraineté chypriote serait une violation des droits de souveraineté, explicitement déclarés, d'un membre des N.U." (*id.*). Further, it would be in breach of the

principle that limitations on sovereignty must not be presumed, although it could easily be argued that the provisions of the Treaty of Guarantee forbidding "any political or economic union with any State whatsoever" expressly impose such a limitation. Despite the terms of the Treaty and though nothing in the Treaty suggests it, the author contends that the guarantors could only exercise their rights, even jointly, if so authorized by the Security Council (p. 14). He makes much of the provisions in Article 103 of the Charter concerning incompatibility of a treaty with the Charter, but he overlooks the fact that when the Treaty was signed, no country, not even Cyprus or any other member of the United Nations, alleged that this had occurred.

The author maintains that, regardless of the legality of the original invasion, there can be no question that once Cléridés assumed the presidency some 6 weeks later, the Turks should have withdrawn. Instead, they extended their occupation from some 2 percent to 40 percent of the island, containing 80 percent of its productive capacity, which turned 200,000 Greek Cypriots into refugees (p. 17). Turkey maintained that the confirmation of Cléridés, instead of the restoration of Makarios, destroyed the Cyprus that had been the subject of the guarantee. On this level, the author is perhaps on stronger ground when condemning Turkey's actions, for now Turkey spoke of the "reconstruction de l'Etat détruit sur une base plus équitable" (p. 18). Constantopoulos is also on firmer ground when he argues that the displacement of the Greek population and takeover of Greek-owned property is incompatible with the obligations of a military occupant (pp. 29-33) or with those flowing from the European Convention on Human Rights (pp. 24-29). It must be remembered, however, that there is more than a little sympathy for the contention that a new constitutional framework should be developed whereby the Turkish minority might enjoy a greater measure of self-government than had been the case in the past (pp. 34-36). Nonetheless, to date, Turkey and the Turkish minority seem unwilling to surrender what they have secured, and this, the author contends, is because Turkey has never abandoned its desire to absorb Cyprus (pp. 38, 42-46). Recent conversations between the leaders of the two communities imply that neither they nor their supporters, Turkey and Greece respectively, are in any mood to compromise at present.

Perhaps what we still need is an analysis of the Cyprus problem expounded by a commentator who is neither Greek nor Turkish, nor *parti-pris*.

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State Immunity: An Analytical and Prognostic View. By Gamal Moursi Badr. The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. viii, 243. Appendixes. Index. Table of Cases. Dfl. 120; £30.50; \$46.

This book seeks to clarify the law of sovereign immunity as currently applied in the courts of the world's principal trading nations and to suggest

a means by which those nations still committed to the absolute immunity theory can move toward acceptance of "unified regulation of the subject."

The text is divided into three parts with separately numbered chapters, an introduction and a summary conclusion. Part I is a relatively straightforward tracing of the historical development of the sovereign immunity doctrine, concluding with proposed criteria for distinguishing between public and private acts in those nations employing the restrictive theory. Part II is a critical review of the doctrine, in which the author seeks to identify a common ground between those who urge absolute immunity and those who support the restrictive theory. He suggests that an analysis based on principles of territorial jurisdiction rather than on an effort to determine whether a given act is "properly" within the sovereign sphere would achieve this result. In part III the author surveys seven recent international agreements and other instruments to provide an overview of the current state of sovereign immunity law.

The purpose of this text is to demonstrate both that there is no longer any basis in international practice for a rule of absolute immunity and that those who advocate the absolute theory could in fact better serve both their own and the community's interest by adopting a jurisdictional analysis.

Badr attacks the argument that absolute immunity is superior because it avoids the difficulty of distinguishing governmental from private acts under the restrictive theory. The distinction turns, he argues, upon objective criteria. Public acts are always unilateral in nature, are always exercised upon corporations or persons within the state's territorial jurisdiction, always regulate some aspect of the public interest and always depend for enforcement on self-help measures under the state's coercive machinery. Private acts, on the other hand, normally require a second party to act with the state in the formation of the legal relationship, operate extraterritorially, accommodate two or more antagonistic interests by directing the parties to a common goal that is the object of the relationship and depend for enforcement only on legal remedies open to *both* parties. Badr maintains that these indicia are always sufficiently clear to rebut any argument that absolute immunity must be the better rule because it is too difficult to distinguish immune from nonimmune acts under the public-private dichotomy of the restrictive theory.

He continues his thesis by pointing out that in domestic as well as in international systems, suits against a nation are not against an abstract "sovereign" but rather against the executive branch of government. In almost all nations, he argues, such suits are permitted in local courts.

Discussing suits by foreigners against states, Badr points out that under the subjective definition of these acts, emphasizing the purpose of the act, the category of immune acts expands greatly. This approach is difficult because it requires determining the motives underlying a governmental act. The objective definition, looking to the nature of the act, emphasizes the type of act involved, a much more limited category, according to the author. He argues that under this definition, all acts *juri imperii* are necessarily outside the jurisdiction of foreign courts because a government can exercise its power only within its own territory. Therefore, the question of sovereign immunity never arises because the foreign court lacks jurisdiction in the first place.

The author's citation of the *S.S. Lotus* case¹ for this proposition leaves something to be desired (p. 92). Although he quotes the familiar passage concerning the territorial nature of a state's power in the appended footnote,² he neglects to mention the *Lotus* case's effects principle, that a state may also exercise territorial jurisdiction over acts that have effects within its territory.³ He claims that the only value of the *gestionis/imperii* distinction was to distinguish between types of property available for attachment to obtain jurisdiction. Now that the United States Foreign Sovereign Immunities Act of 1976⁴ forbids such attachments, the distinction is useless and proper rules of state immunity should no longer be based on it.

Badr clearly rejects the proposition that public international law requires immunity when another sovereign acts within the host sovereign's borders or causes effects therein. By discarding the *juri gestionis/juri imperii* distinction, he necessarily concludes that even those acts that would otherwise be characterized as "public" under that dichotomy are not required to be treated as immune by customary international law. In other words, the immunity of foreign sovereigns will be determined as a function of domestic law under principles of comity, not by the direct application of a prohibitory international legal rule in a domestic court.

In reaching this conclusion, Badr follows the reasoning of Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*.⁵ In that case, Marshall concluded that a French public warship entered U.S. ports only with the understanding by the French sovereign that it would not be subjected to the sovereign power of the U.S. Government. For the law to assume otherwise would contradict the principle that sovereigns have absolutely equal legal status in the international community. Thus, Marshall found that the French ship had an implied license to enter the United States. Such a license carried with it a presumption of immunity that could be revoked only with advance notice by the host state.⁶

Marshall makes it clear that while there may be an international legal rule requiring notice when sovereign immunity will not be extended to public acts or sovereign property, there is no international rule requiring immunity for foreign sovereigns, even for public acts, as long as notice that immunity will not be granted is given in advance by the host sovereign. This conclusion makes a great deal of sense, both conceptually and functionally. The principle of absolute sovereign equality is fundamental to international legal theory, in which community consent is the only limit on absolute sovereign rights, a proposition clearly stated in the *Lotus* case. To take the position that a sovereign state is required by customary international law to waive its territorial authority in favor of another sovereign acting within that territory—

¹ *S.S. Lotus* (Fr. v. Turk.), 1927 PCIJ, ser. A, No. 10 (Judgment of Sept. 7).

² "[T]he first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State." *Id.* at 18, quoted in the book under review at p. 159 n.43.

³ *S.S. Lotus*, 1927 PCIJ, ser. A, No. 10, at 23.

⁴ Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611 (1982).

⁵ *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

⁶ *Id.* at 144.

or whose acts have effects within the territory—suggests an anomaly. If it is only with the acquiescence of the host sovereign that the foreign sovereign may enter, then it is clear that Marshall's analysis must be accurate, not only as a matter of U.S. domestic law, but as an accurate reflection of the requirements of the international legal system as well. It is the act of acquiescing to entry and the acceptance of that acquiescence by entering that creates the immunity, not an international consensual rule that limits the authority of the host within its own territory. Therefore, the immunity of foreign sovereigns arises from the interaction of reciprocal tolerances between nations. The host sovereign withholds its power in the first instance in order to avoid, in a future reversed situation, being subjected to the power of its erstwhile guest.

Thus, the principle of comity—the international golden rule that states should treat others as they would be treated in the same or similar circumstances—is the touchstone for sovereign immunity analysis. Its application effectively preserves the principle of absolute sovereign legal equality, a conceptual result not possible under a consensual prohibitory rule of public international law requiring a sovereign to restrain its power within its own territory in required deference to the sovereign capacity of an “invited” guest.

Put another way, there is not now, nor has there ever been, an international legal prohibition against the exercise by one sovereign of its authority over another present within its territory. To the extent that such a prohibition was envisioned by early writers, it was based on a natural law analysis no longer viable in international legal theory.⁷

If this analysis is accurate, and I strongly suggest that it is, then Badr's recommendation that sovereign immunity cases be resolved by principles applied to resolve conflicts where two or more states have concurrent jurisdiction makes a great deal of sense. Those conflicts, too, are resolved in national courts on the basis of comity, not as a result of finding consensual international legal restrictions on a sovereign's power to act. An effort made (and retracted) by the reporters for the *Restatement of Foreign Relations Law of the United States (Revised)* to treat limits on domestic jurisdiction in U.S. courts as if they were imposed by the consent of nations⁸ rather than the result of mutual tolerances exercised for reciprocal good was substantially modified, principally because insufficient evidence of state practice implying consent to such limiting rules could be mustered to support it.

Badr concludes, after surveying the laws of several states and the provisions in seven multilateral international agreements, that, in fact, foreign states before national courts are assimilated both to the status of the visiting sovereign before its own national courts and to the status that the host sovereign would occupy before its own tribunals. He concludes:

Criticism of the assimilative theory based on the argument that immunity belongs to international law whereas the position of the state

⁷ See, e.g., E. DE VATTEL, *THE LAW OF NATIONS* 3–8 (C. Fenwick trans. 1916).

⁸ Compare *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)* §403(3) (Tent. Draft No. 2, 1981) with *id.* §403(3) (Tent. Draft No. 7, 1986).

before its own courts is governed by internal law misses an important point. International law, properly so-called, regulated inter-state relations at the level of national supreme political authorities, not to say sovereignties, in their contacts and interaction. In a dispute before the local courts involving a foreign state what is at issue is not an inter-state relationship but a relationship between two subjects of private rights and obligations of whom one happens to be a state acting more *privatorum*. It is not, therefore, a matter pertaining to public international law as such [p. 135].

Badr's analysis has the virtue of casting aside traditional characterizations while emphasizing the reality of state practice and attitudes. He rightly attributes much of the difficulty surrounding sovereign immunity in national courts to the emotional climate created by too closely linking immunity to sovereignty. In modern international practice, he says, "The negation of the principle of state immunity is disguised as a mere re-count of the exceptions to an ostensibly reaffirmed general rule of immunity" (p. 134).

Although the writer's style is somewhat turgid and his theories often lack effective decisional or scholarly support, the book is a useful work with a thought-provoking analysis. The author succeeds in narrowing the frame of reference within which national courts are to view sovereign immunity cases and correctly points out that public international law is irrelevant to these determinations. His characterization of all issues related to acts *juri imperii* as essentially jurisdictional in nature suffers in part from a reliance on a too tidy conceptualism. However, the ultimate conclusion that sovereign immunity issues should be analyzed in the same mode as jurisdictional issues is compelling. Treating all such questions as manifestations of the principle of comity in national courts is both accurate and desirable. It maintains the flexibility needed to develop appropriate responses to particular situations and interrelationships while clearly fixing the responsibility for whatever international tension may result from the forum court's or legislature's decision not to restrain itself from adjudicating the case before it.

HAROLD G. MAIER
Board of Editors

Risoluzione e sospensione dei trattati per inadempimento. By Riccardo Pisillo Mazzeschi. Milan: Giuffrè Editore, 1984. Pp. viii, 351. Author index. L. 22.000.

Breach of treaties and the responses available to injured parties do not count among the "fashionable" topics in the literature on international law and, more specifically, on the law of treaties. The few works published before the book under review are either totally obsolete or insufficient from the theoretical point of view; to the latter group belongs the only monograph in English, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party*, by B. P. Sinha (1966).

One therefore welcomes the publication of this volume by Riccardo Pisillo Mazzeschi, professor at the University of Siena, in which he takes a fresh

look at termination and suspension of treaties due to their violation. Still more important, Pisillo's study is the first attempt to discuss breach of treaties not only from the (usual) angle of the law of treaties but also from that of state responsibility, currently in the process of codification by the International Law Commission.

The book is divided into six chapters. Chapter I (pp. 7-92) records the state of general international law before the Vienna Convention on the Law of Treaties of 1969. Chapter II (pp. 93-181) presents both the legislative history and a systematic analysis of Article 60 and the other pertinent provisions of the Convention.

In the third chapter (pp. 183-225), the author reviews the subject in the context of state responsibility, analyzing breaches as a particular category of "internationally wrongful acts" in the sense of part 1 of the draft articles provisionally adopted by the ILC in 1980, and termination and suspension as countermeasures according to draft Article 30 of part 1 and the draft articles of part 2 proposed by Special Rapporteur Riphagen.¹ To sum up Pisillo's findings on the compatibility of the breach concept in the Vienna Convention and that in the ILC draft on responsibility, considerable work still has to be done before the two regimes fit together smoothly. Chapter IV (pp. 227-70) deals with the development of general international law through recent (rather well-known) cases. Chapter V (pp. 271-311) is a short study on Article 5 of the Vienna Convention, namely, on the residual applicability of the rules on breach of treaties to the constituent instruments of intergovernmental organizations. The concluding chapter (pp. 313-44) is devoted to the question whether measures of termination and suspension due to breach with their *sedes materiae* in the law of treaties can be clearly distinguished and kept separate from nonarmed reprisals. Pisillo reasons that they cannot, but, in the opinion of the reviewer, his arguments are not entirely convincing.

Following the practice of many Italian monographs, the book contains neither a bibliography nor a subject index. Instead, a name register of the authors cited tickles academic vanity.

Altogether, Pisillo's study is a solid, scholarly piece of work. Even though the author has almost exclusively used cases and materials digested in prior publications, the reader will be able to gain new insights into the breach syndrome. Thus, the book is a good example of the modern Italian international law literature that, instead of exhausting itself (and the capacity of the reader) in all-too-abstract theoretical speculation, has learned to apply a traditionally sharp legal mind to the mass of empirical material now available. It is a pity that outside Italy the book will be accessible to only a handful of scholars.

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¹ An English version of this chapter will be published in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 57-94 (M. Spinedi & B. Simma eds. 1986).

Transnational Contracts: Law and Practice. Binder *. By Georges R. Delaume. Dobbs Ferry: Oceana Publications, Inc., 1983. \$125.

This book is a valuable research tool for practitioners and scholars alike. It deals with two broad areas: (1) drafting transnational contracts to avoid disputes, and (2) resolving transnational contract disputes in the courts or through arbitration once they arise. There are few, if any, other sources that treat in one volume the wide range of topics Delaume covers here, namely, the practicalities of drafting transnational contracts; choice-of-law and choice-of-forum issues; proof of applicable law; adjudicatory jurisdiction under American, British, French and German law; procedural and related issues in arbitration proceedings (commercial cases and investment disputes); and enforcement of foreign judicial and arbitration awards. Loan and investment contracts are particularly well treated, reflecting, one assumes, the author's expertise as Senior Legal Adviser for the World Bank.

This single volume is a composite hornbook, form book and casebook for these topics. As a hornbook, it contains a treatiselike discussion of the law in leading common law and civil law jurisdictions concerning the topics just mentioned. It also contains many examples of actual contracts and proposed contract clauses; hence its similarity to a form book. Moreover, the author has included numerous edited judicial opinions from American, British, French, German and other courts, not to mention excerpts from other scholarly writing and notes and questions; hence the likeness to a casebook.

Most of the *Law and Practice* volume appears to overlap in subject matter with the earlier five-volume (binder) treatise by Delaume under the same title: "Transnational Contracts: Applicable Law and Settlement of Disputes (A Study in Conflict Avoidance)." The topics discussed in each, for example, include: excuse for nonperformance (*force majeure*), choice of law (both when the parties stipulate applicable law and when they do not), judicial settlement of disputes (personal jurisdiction, sovereign immunity, questions of attachment, and recognition and enforcement of foreign judgments) and arbitral settlement of disputes (enforcement of agreements to arbitrate, procedural issues, choice of law and enforcement of foreign arbitral awards). In these areas of overlap, the *Law and Practice* volume is more concise and more up-to-date (although both the *Law and Practice* volume and the larger treatise are published in binders to facilitate periodic updates, which have been regularly forthcoming). Paradoxically, the *Law and Practice* volume contains many more judicial opinions than does the earlier and larger work, but in excerpted and edited form; it also contains more and different sample contracts and contract clauses than the treatise binders. *Law and Practice* includes several introductory chapters dealing with rather pragmatic topics such as understanding the negotiating style of Chinese, Middle Eastern or Japanese counterparts and being sensitive to language and style differences in drafting contracts, again not found in the treatise.

The most valuable aspects of this volume are its comparative law emphasis, its inclusion (at appropriate points in the textual discussion) of a variety of

actual contracts and contract clauses in use, and its many citations to other sources for further research. This is not a volume that will give one a deep or exhaustive treatment of any of the issues it covers, but it is certainly a useful starting point for research into transnational contract problems.

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Meeresforschung und Meeresfreiheit: Perspektiven nach der dritten UN-Seerechtskonferenz. By Axel Borrmann and Hermann Weber. Hamburg: Verlag Weltarchiv GmbH, 1983. Pp. 479. DM 76.

This book (entitled "Marine Scientific Research and the Freedom of the Seas: Perspectives after the Third UN Conference on the Law of the Sea") is based on a study conducted by the authors under a contract with the Ministry of Research and Technology of the Federal Republic of Germany. According to the foreword, the purpose of the study was fourfold: (1) to identify the new legal framework for West Germany's marine scientific research; (2) to describe the present and potential consequences of recent developments in the law of the sea for West Germany's marine scientific research; (3) to indicate options and courses of action from the point of view of research policy; and (4) to discuss appropriate measures to be taken to adapt West German marine scientific research to the new legal situation. The study does not deal with commercial and military marine research; scientific research in the Antarctic region is also excluded from its scope.

In part I the authors provide a brief, but adequate, analysis of the international legal regime for marine scientific research elaborated by the 1958 Geneva Conference on the Law of the Sea and modified by the Third UN Conference on the Law of the Sea (based on the August 1981 Draft Convention; however, no substantive changes were made in the science provisions), and of recent developments in the customary international law of marine scientific research. The emphasis is on the exclusive economic zone and the continental shelf, which are the most important areas for marine scientific research. The authors also devote a substantial amount of attention to the provisions on the settlement of disputes of the Law of the Sea Convention.

Borrmann and Weber regard the loss of the traditional freedom of research as irreversible. In their view, the science provisions of the new Law of the Sea Convention in many respects reflect current state practice and contain the minimum of rights and duties regarded by the overwhelming majority of states as essential for regulating marine scientific research.

On the basis of their analysis of recent state practice, they conclude that future marine scientific research would have a much more secure foundation and be able to function under noticeably less restriction if the Convention were to enter into force. Its provisions would prevent coastal states from claiming excessive geographical jurisdiction (e.g., territorial seas beyond 12 nautical miles) and from imposing excessive conditions on research. All par-

ties would be subject to a detailed, uniform regime, and disputes would have to be settled in accordance with compulsory procedures. Such a regime would also enhance the possibilities for planning research activities.

These conclusions are certainly correct, but since it may take quite some time for the Convention to enter into force (if it ever does), most marine scientific research will for the time being remain governed by customary international law. However, as the authors themselves also point out, the Convention's provisions at present exert a considerable influence on customary international law since they serve as a point of reference for many states in their practice. Thus, many advantages of the new conventional regime may also materialize through customary law.

Part II deals with the prospects for West Germany's marine scientific research and consequences for its research policy. The authors conclude that, although many coastal states are already applying the new regime, German research expeditions are still operating by and large without hindrance. They attribute this to the positive research climate resulting from bilateral and multilateral cooperation programs with the coastal states involved and the long-standing contacts between the scientists and scientific institutions concerned (often despite considerable bureaucratic barriers). Apparently, there is a considerable difference between the restrictive possibilities available to coastal states and the actual use they make of them.

On the other hand, the authors notice that coastal states have taken a much more critical approach towards foreign marine scientific research. Coastal states will require more detailed information on the possible economic, politico-military and ecological implications of marine scientific research projects. The authors expect, in particular, that areas under coastal state jurisdiction will not be open to foreign research that bears directly on the exploration or exploitation of natural resources, unless bilateral or multilateral agreements on the economic utilization of those resources have been concluded.

The authors define the following aims for the marine scientific research policy of the Federal Republic of Germany: (1) to maintain access to its traditional research areas and to facilitate the opening up of new areas; (2) to secure as large a scope as possible for such activities; (3) to reduce the existing and expected elements of uncertainty in the planning and implementation of research projects; and (4) to offset the financial costs that result from the new legal situation and, if necessary, to reallocate such costs. These aims can probably apply to any country with substantial interests in conducting marine scientific research in areas under foreign jurisdiction. According to the authors, to achieve these aims it is essential that the West German scientific community adopt a positive attitude towards the research regime of the new Convention. In addition, much effort should be put into creating and maintaining an atmosphere of mutual trust between coastal and research states (in particular, through scientific cooperation). This would promote a (much needed) liberal interpretation of the new regime (presumably, not only by the coastal states involved; but by the Federal Republic as well).

In part III the authors discuss ways to adjust West German marine scientific research to the developments in the law of the sea. The measures they propose concern alterations in the internal West German bureaucracy (the setting up of a central information and advisory center and the improvement of administrative procedures), the facilitation of research through bilateral cooperation with the coastal states of most interest to West Germany in this regard (here the authors stress educational and scientific assistance to developing coastal states) and the facilitation of research through international organizations (especially the Intergovernmental Oceanographic Commission and the International Council for the Exploration of the Sea). Many of the measures suggested by the authors will sound familiar to those who have been involved in marine scientific research policy over the past decade; still, this part of the book contains various useful suggestions to scientists and science administrators in most research states.

Finally, the book contains several figures and annexes that provide extremely interesting information on West German marine scientific research policy and practical experience. Such information has so far become available (publicly) on only a few states (notably, the United States). For the non-German reader, the book derives its value especially from such features. It can be recommended as a model for similar case studies on other countries.

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International Codes and Multinational Business: Setting Guidelines for International Business Operations. By John M. Kline. Westport and London: Quorum Books, 1985. Pp. vi, 184. Index. \$35.

As Deputy Director of the Karl F. Landegger Program of International Business Diplomacy at the Georgetown University School of Foreign Service, Dr. Kline is well qualified to undertake a work of this nature. Not only does he exhibit a thorough understanding of the intricacies of international business relationships, but he has supplemented his own expertise on multinational corporations in general by extensive research in the specific area of codes, covering a substantial selection of documents and works by other authors.

If there is one disappointment to the legal reader it resides in the paucity of in-depth analysis; but the author states clearly that such analysis is beyond the scope of the work, and one accepts, given the number of codes extant, that a much larger volume would be necessary to accomplish such a task. Kline does provide, in an early chapter, a useful look at initial "roadblocks" to international investment law, pointing out that the world community was unable to reach an international law solution in the investment field primarily because of the perceived threat to national sovereignty.

Taking the work as an extremely conscientiously constructed survey of intergovernmental and corporate codes of conduct, rather than looking for an in-depth or legal analysis of individual codes, the reviewer sees this treatise

as the most comprehensive treatment of the subject that has come to her attention. Indeed, its thoroughness reaches proportions where only the most avid followers of international code developments are apt to take in the work in its entirety. Even those who do feel less inclined to read it from cover to cover, however, will find the book a useful reference (indexed) for their specific concern.

Roughly half the book (chs. 2-5) is devoted to identifying the origins of international codes and to tracing their evolution into a "new form of intergovernmental accord" aimed at establishing voluntary guidelines and standards of conduct for multinational corporations (MNCs). The rest concentrates on an enumeration and elaboration of the proliferating international codes and guidelines—both governmental and corporate—for MNCs.

Historically, Kline sees the development of codes and guidelines as directly attributable to the failure of multilateral diplomacy to achieve more traditional agreements in the international investment area. There has indeed been resistance to legally binding instruments, which are seen as potentially hindering the exercise of national sovereignty in this sensitive area of ever increasingly internationalized and globally integrated economic systems. The author makes the point that recourse to nonbinding code instruments helps to circumvent obstacles impeding an international law solution. The voluntary nature and flexible implementation process of nonbinding code instruments, aimed for the most part at corporations, allow governments to maintain maximum sovereign authority over their application on a case-by-case basis.

The first and major portion of the book proceeds from setting the historical context and following the growth of the MNC, through discussing the catalysts and stimuli leading to more recent code developments and various national and regional responses thereto, to offering concrete cases of intergovernmental codes (using the OECD as a prime example) and elaborating on their use as law, as levers and as guidance, respectively.

The emphasis then shifts (chs. 6 and 7) to the private business code movement, proceeding from the general to the specific and providing examples and sample extracts from current corporate codes. Aggregate code approaches are compared, followed by an examination of positive examples of the means by which certain corporations formulate policies to address particular international needs.

Consistent with the survey function of the work, noted above, the scope excludes case studies of the actual application of these codes. While one might wish for such studies, one is aware of the vast number of codes perused by the author (from over one hundred leading MNCs) and understands the difficulties inherent in any selection process, the sensitivities of corporate confidentiality and other constraints upon such a process. Kline does elaborate on the integration of purpose and form in what he terms the "corporate identity code" approach, whose aim is to assure that corporate goals are reflected and supported by the code structure. In so doing, he includes a look at constituency group relationships and how the codes deal with ethical norms. Of the private business code models, the author distinguishes among

"employee guidance codes," "public relations codes" and "corporate identity codes," promoting the latter as a vehicle for ethical guidelines for individual employee actions that serves at the same time to provide standards of business conduct that rise above minimum legal norms.

Following a series of illustrations on the way firms can adopt policy guidelines that relate business operations to international circumstances, the author elaborates on the structuring of training, review and revision functions within an enterprise.

The final chapter sums up the author's view of the outlook for international codes (governmental and business) and assesses the role of individual MNC codes. Kline sees international codes as likely to proliferate since they meet governmental needs to reduce friction over troublesome MNC issues and to mitigate multi-jurisdictional problems and confrontations over conflicting national policies. He views individual MNC codes, on the other hand (admitting some notable exceptions), as failing to address significant international concerns over MNC operations or to reflect a firm's real international commitment.

Kline's own evaluation of his work is that it is dominated by political and business pragmatism and that the pragmatic emphasis undervalues subjective interpretations of an MNC's global responsibilities, which he recognizes as a vital part of the picture. He sums up the role of the MNC as assuming neither the right nor the responsibility to determine the fundamental standards that govern a society, yet having an obligation to communicate its own standards and procedures to enable society to judge accurately the appropriateness and role of that enterprise in meeting society's needs. While the enterprise must produce goods for society's consumption—that is, after all, its *raison d'être*—it must not engender harm in the process. A corporate code offers a challenge and an opportunity to exceed simple conformity to the requirements imposed upon the corporation by law. Kline concludes that governments settle upon voluntary intergovernmental codes to bridge differences without sacrificing national sovereignty and submits that corporations should respond to code pressures because the alternative is greater regulation or increased conflict.

Kline correctly warns the reader, in closing, that while the intensity of interest in curbing MNC activity has waned in the 1980s, complacency would be ill-timed. He sees the respite as likely to be quite brief and the problems as ready to resurface, since fundamental jurisdictional problems and pressing global issues remain unresolved. Even with the increased attention on international trade vis-à-vis foreign direct investment, the author cautions that "the increased use of nationalistic trade performance requirements places greater pressure on MNCs in ways that directly affect global decision-making and leave the firm exposed to competing demands in home and host countries" (p. 161).

In the reviewer's opinion, *International Codes and Multinational Business* distinguishes itself first and foremost for its exhaustive treatment of the subject matter and its dispassionate objectivity. It is a scholarly work of the first order—comprehensive and thoroughly researched, without resort to

the emotional rhetoric so often associated with discussions revolving around MNCs. The author confirms in his closing lines that he is not an "avowed MNC critic" but rather "one who believes in the general good conduct of most companies, and in their potential to do still better." His approach, therefore, is to encourage the use of both intergovernmental and private business codes to promote both the public interest and private business interests, arguing that these two sets of interests are in no way mutually exclusive.

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Mezhdunarodnoe Kosmicheskoe Pravo (International Outer Space Law). Edited by A. S. Piradov. Moscow: Mezhdunarodnye Otnosheniia, 1985. Pp. 205. 80 kopecks; \$2.95.

A team of authors led by specialists of the USSR Ministry of Foreign Affairs has presented what is defined as a pioneering Soviet textbook on outer space law for what are said to be the many law faculties now giving courses on the subject. Although most of the volume is devoted to provisions of the Treaty on Outer Space of October 10, 1967 and related conventions on atomic testing, scientific exploration, rescue of astronauts and their ships, responsibility for damage, registration and activity on the moon and other heavenly bodies (texts of which, plus relevant UN resolutions, are printed in an appendix), there is material of broader interest to Western scholars concerned with trends in Soviet thinking.

The authors make clear that conservative positions predominate in their ministry. They see no trend toward an independent outer space law apart from generally accepted principles of law. Subjects of this law remain only states and those international organizations authorized by their members to act in outer space. No individuals or private corporations engaged in lofting satellites to outer space can be subjects. Even astronauts are not subjects, though the Treaty calls them "Ambassadors of Mankind in Outer Space," for the appellation is no more than a ceremonial gesture. Corporations cannot claim to be subjects merely because in defining responsibility, states are made responsible for the activity of both state and nonstate legal persons.

"Mankind as a whole" has no standing in spite of the arguments of some Western scholars. The reason for rejecting such a concept is peculiarly Soviet:

This position cannot be recognized as scientifically well-founded since it does not take into consideration the contemporary reality of life in the international community and in international relations, for which the foundation is peaceful coexistence of states with different socio-political and economic systems. Under these conditions mankind cannot present itself as a whole, as the bearer of one set of rights and duties [p. 33].

The authors note that the 1967 Treaty provides no definition of outer space or of "objects" to which it applies. As to the first omission, they note that the UN committee charged with definition has not progressed with its task. As to the second, they conclude that practice has adopted as "objects" those vehicles for which registration is required under the Convention on Registration. The Treaty applies to vehicles on the ground at the moment of propulsion into space: before propulsion, the Treaty does not apply, but after propulsion it applies when the vehicle descends as the result of accident or otherwise (as evidenced by the obligation to pay damages resulting from landing and to return the vehicle to the sending state).

The activities included under the Treaty include not only propulsion into orbit or beyond earth's gravity but also the activity of astronauts and the operation of instruments on board the spacecraft such as the transmission of television programs or information of geodetic and meteorological information, since the lives of people of many states are influenced.

The authors reject proposals to extend the concept of the "heritage of mankind" to outer space. They note that such space is declared to be *res extra commercium*, but this provides no basis for the establishment of an outer space agency with supranational functions such as the resolution of disputes or the supervision of activities in outer space. Also, there must be no extension of space law to compel states operating in outer space to help those unable to reach it, much less to bring them into outer space programs. The authors fear that internationalization of outer space activity would serve as a restraining force on technical progress in space. Evidently, the provisions of the Convention on the Law of the Sea should not be extended to what might seem to be a comparable area.

JOHN N. HAZARD
Board of Editors

Comparative Law and Legal System: Historical and Socio-Legal Perspectives. Edited by W. E. Butler and V. N. Kudriavtsev. New York, London, Rome: Oceana Publications, Inc., 1985. Pp. x, 141. \$20.

This book is a collection of the conference papers from a British-Soviet legal symposium. Having organized and participated in similar symposiums myself, I agree thoroughly with Professor Butler's statement, in his introduction to this volume, that such studies are "a veritable genre of legal literature of their own, to be measured against the past, the tenor of the times, the constraints inherent in the medium, and the possible unexploited possibilities of that medium." Using this relative standard, the symposium reported in this volume must be rated as one of the more successful of such meetings between scholars of the Soviet and common law systems.

It is very difficult to communicate much in a dozen pages about a specific subject to a scholar from a radically different legal system. Several of the British papers in the symposium have managed to overcome this problem. Butler's own paper on *The Inter-Dynamics of International and Municipal Law*

effectively draws upon his knowledge of Soviet law, Anglo-American law and international law. Professor Bernard Rudden's paper, entitled *Comparative Law in England*, clearly brings out the Roman law heritage shared by English and Soviet law. This American reader learned much from Professor B. A. Hepple's *The Scope and Function of the English Law of Tort*. The Soviet participants must likewise have benefited from papers like Hepple's, which presented current legal controversies in their historical background.

The difficulties in symposium communication are compounded for Soviet scholars by their reluctance to air in an international forum the intense and interesting disputes that characterize much of their legal writing for domestic consumption and by their tendency to include in their papers nonsense that they know to be nonsense. An example of both problems is the paper by Professor V. A. Toporin, *The Constitution in the Soviet System of Law (General Characteristics)*, which contains a purportedly serious discussion of the different types of majorities required in the Supreme Soviet for ordinary legislation and constitutional amendments. Some of the Soviet authors did manage to overcome the greater difficulties they faced. For instance, Professor V. A. Tumanov presents an excellent paper on the purposes and methods of comparative law study. His colleague, V. Smirnov, provides useful insights into the work of Soviet legal sociologists.

The better pieces in this book show that attempts at communication between Soviet law scholars and common law scholars can be worthwhile. As Butler points out, many "unexploited possibilities" remain.

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Foreign Relations of the United States, 1951, Volume IV: Europe: Political and Economic Developments. 2 parts. Part 1, Dept. of State Pub. 9425. Part 2, Dept. of State Pub. 9424. Washington: U.S. Govt. Printing Office, 1985. Pp. xxxvi, 1890. Index in part 2.

This collection of 943 documents constitutes the Department of State's impressive contribution to the official resources on U.S. political and economic relations with Europe during the critical transition period of the early 1950s. The Brussels Pact, the North Atlantic Treaty and World War II European Axis satellite peace treaties had been signed, Austria was still under occupation, the integrative movement was under way in Western Europe, the East-West Cold War was intensifying and the Korean War raged in Asia. This compilation deals with both policymaking and implementation during 1951 and is the last of the seven *Foreign Relations* volumes planned for that crucial year; others in the series that relate to U.S. European affairs include volumes I (on national security affairs, published in 1980) and III (on European security and the German question, published 2 years later).

This compendium consists of two parts. The first (pp. 1-1008), devoted to Western Europe, consists of separate sections providing materials on multilateral relations (267 pp.) and on 12 individual countries and the Vatican.

Part 2 (pp. 1009–872) focuses on Austria, Eastern European multilateral relations and eight individual countries. Of the 20 countries treated in separate sections, the largest documentary attention is paid to Austria, Czechoslovakia, France, the Soviet Union, Spain and the United Kingdom. There are no separate sections for Denmark, Finland or Greece, and Germany is treated in another volume, as indicated in the preceding paragraph.

So far as multilateral relations are concerned, nearly four hundred pages deal with U.S. encouragement of political and economic integration (in the activities of the Council of Europe, the European Payments Union, the Organization for European Economic Cooperation, the Schuman Plan and the signing of the European Coal and Steel Community Treaty on April 18), the European coal crisis, U.S. interest in plans for the migration of surplus population from Western Europe (including the Brussels Conference on Migration, November 26–December 5), the status and administration of Trieste (established as a Free Territory by the Big Four in the World War II Italian Peace Treaty in 1947), and two American ambassadorial conferences held at Paris and Frankfurt early in the year to discuss pressing European problems.

Multilateral relations in Eastern Europe involved U.S. efforts to assure fulfillment of the World War II Treaties of Peace with Bulgaria, Hungary and Romania (the United States was not a party to the treaty with Finland), U.S. civil aviation links with Eastern Europe, the attitude of the United States toward East European exile groups and escapees, and the U.S. response to Soviet peace propaganda. The World Peace Council (created by the Communist-dominated second World Peace Congress, which met at Warsaw in November 1950) convened in Berlin in February 1951 and sponsored a Five-Power Peace Pact for which it sought widespread endorsement and signature. Among the reactions in the United States, Congress passed the McMahon-Ribicoff resolution, reaffirming the friendship of the American people for all peoples of the world, including those of the Soviet bloc. This resolution became the basis of an exchange of communications between President Truman and Soviet President Nikolay Shvernik (see pp. 1607–11, 1635–41, 1643–48 and 1658–60). Documentation also relates to East-West Deputy Foreign Ministers' talks in Paris and negotiations for a Four-Power Foreign Ministers Conference (France, the Soviet Union, the United Kingdom and the United States), covered in greater detail in volume III of the *Foreign Relations* series for 1951.

Aside from broad issues of policy, in the segments on individual Western European countries, particular attention is paid to such matters as NATO affairs (a medium-range defense plan and consideration of possible Irish and Spanish membership), negotiation of U.S. bilateral defense agreements with Iceland and Norway, U.S. base rights in the Azores (Portugal) and Spain, military and economic assistance of various types, UN membership for Italy, the revision of its Peace Treaty to ease Italy's financial responsibilities and change the legal status of Trieste, activities of the European Cooperation Administration and the General Agreement on Tariffs and Trade (GATT),

and U.S. support under the Mutual Security and the Trade Agreements Extension Acts (both enacted in 1951). This volume also presents documentation on President Truman's nomination of Mark Clark to serve as the American "Ambassador to the State of Vatican City" (which was withdrawn from the Senate by the President on January 14, 1952, at Clark's request).

Documents on Austria, found in a separate section on Central Europe, deal primarily with two issues: occupation problems (financial assistance to Austria, occupation costs, U.S. relations with the other three occupying powers and electoral politics) and problems encountered in the negotiation of the Austrian State Treaty (which was not signed until 1955). Others pertain to the U.S. interest in the formation of Austrian security forces (creating an army and arming the *gendarmérie*).

The sections on relations with Eastern European countries contain materials on East-West trade; the East European refugee problem; activities of Radio Free Europe and the Voice of America; the mistreatment of U.S. diplomatic and consular personnel, particularly in Czechoslovakia, Hungary and the Soviet Union, together with the application of reciprocal restrictions and U.S. sanctions; and the possibility of the outbreak of war between the Soviet Union and the United States. The retrogression of U.S. relations with Eastern Europe is also exemplified by documents on alleged U.S. border and airspace violations of Czechoslovakia and Hungary, debate over freedom of navigation on the Danube and a copyright dispute with Moscow; especially revealing are the celebrated cases of William Oatis (an American businessman) and Robert Vogeler (an American correspondent), who were arrested and convicted respectively in Czechoslovakia and Hungary for antistate activities and espionage, which the Department of State regarded as travesties of justice.

This compilation contains the customary diplomatic resources—ranging from messages, notes, telegrams and memorandums to position papers, proposals and plans, staff studies, reports and other types of papers—concerned with the formulation and communication of U.S. foreign policy and its implementation through negotiation, that flowed between the Department of State and U.S. missions abroad as well as other agencies of governance in Washington, including the Joint Chiefs of Staff, the Economic Cooperation Administration and especially the National Security Council. The latter embrace four Intelligence Estimates (dealing with probable Soviet courses of action, the vulnerability of the Soviet bloc to economic warfare, the possibility of a Soviet invasion of Yugoslavia and the situation in Albania), NSC Determination No. 2 (a report on trade between Austria and the Soviet bloc) and a number of NSC documents (focusing on U.S. policy toward Spain, Switzerland and the Soviet satellite states, the Communist threat to Italy, options to be considered if the Soviet Union closed the Baltic, U.S. military assistance to Yugoslavia and international port security).

Those interested in top-level diplomacy may welcome the documents pertaining to President Truman's summit correspondence with the Kremlin, the summit visits of President Vincent Auriol and Prime Minister

René Pleven of France and Italian Prime Minister Alcide de Gasperi to the United States, and the talks held by Secretary of State Dean Acheson with French Foreign Minister Robert Schuman.

In terms of selectivity, content, organization and treatment, this compendium comports with the traditionally superior standards of the Office of the Historian of the Department of State in producing the *Foreign Relations* series, and it is welcomed by, and should be useful to, all who are concerned with the diplomatic relations of the United States during the early 1950s. To assist the user, its editors supplement the textual materials with a liberal supply of explanatory, descriptive and cross-referencing editorial notes. They also provide an inventory of nearly four hundred abbreviations, symbols and acronyms, a 13-page catalog of persons with their official titles and ranks, a short list of official and unofficial published volumes including several key memoirs, a complete list of unpublished resources with their archival designations (which, in addition to the central files of the Department of State, were used to prepare this volume) and a carefully prepared and structured 16-page dual-columned index.

ELMER PLISCHKE

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BRIEFER NOTICES

Magistrala Wodna: Bałtyk-Morze Czarne. By Stanisław Wajda. (Opole: Instytut Śląski, 1982. Pp. 201. Zł. 60.) Two major European rivers empty into the Black Sea, the Danube in the west and the Dnieper in the east. The Dnieper, which flows southward and begins very close to the headwaters of rivers that flow northward into the Baltic, provided for centuries, if not for millennia, an avenue for trade and conquest between the two inland seas. There is no such natural linkage between the Danube and the north-flowing Oder River, which empties into the western part of the Baltic. Dr. Wajda (a member of the Silesian Institute who already has to his credit several works on rivers and river navigation) painstakingly and skillfully leads us in this book through repeated efforts and failures to create an artificial link between the Danube and the Oder. In doing so, he reviews the development of the international law on navigation and other river uses as it pertains to these two rivers. The treatment of rules concerning the use of canals is of interest. The author not only discusses in detail relevant treaties, including the 1948 convention that changed the Statute of the Danube, but also reviews the practice of riparian states and the views of prominent writers on international water law. The longish bibliography and list of sources at the end of the book are very useful, but the lack of an index makes it difficult to consult as a reference. The literature on the Oder and the Danube is quite extensive; the special value of this book is that it treats the two rivers together and brings the common aspects of their respective histories up-to-date.

LUDWIK A. TECLAFF

Fordham University School of Law

Les Traités dans la vie internationale: Conclusion et effets. By Suzanne Bastid. (Paris: Economica, 1985. Pp. 303. F.135.) This book is an updated publication of the lectures that Professor Suzanne Bastid gave on the law of treaties when she was responsible for the course on public international law at the University of Paris II in 1976–1977, an academic year during which, after almost 10 years of interruption due to her teaching at the doctorate level,¹ she resumed giving this major third-year course for the master's degree. Thus, this book is first and foremost directed at students. In that respect, it accurately exemplifies French legal teaching methods as applied to international law and, in particular, to treaty law. American readers should understand that Suzanne Bastid's international law course used to be a best seller among the various published international law courses that were available to French law students. This longstanding popularity derived from three distinctive features that readers will equally find in this book: clarity, simplicity and concreteness.

The book is divided into five parts: "Conclusion of Treaties" (pp. 15–110), "Effects of Treaties" (pp. 111–56), "Consequences on Treaties of Changes in International Society" (pp. 157–89), "Termination of Treaties" (pp. 191–218) and "Treaties to which International Organizations are Parties" (pp. 219–60). The basic legal materials of analysis are the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1982 ILC draft on treaties concluded between states and international organizations or between two or more international organizations. Each legal issue is discussed with systematic factual reference to international practice, as underlined by the title of the book; French practice in no way receives more attention than any other. On disputed or controversial matters, Bastid follows cautious and noncommittal approaches. Of particular relevance for such matters are her commentaries on *jus cogens* (pp. 152–56), whose definition under the 1969 Vienna Convention has always been opposed by the French Government, or on the possible effects upon member states of treaties concluded by an international organization (pp. 254–55). By and large, Bastid remains faithful to the French legal teaching tradition of favoring the explanation of problems over the advocacy of positions.

On the whole, this book is basically a clear presentation of the law of treaties in force in contemporary international society. In many respects, it illustrates the well-established, but endangered, international jurisprudence that prevails among French scholars who are still reluctant, unlike an increasing number of their foreign colleagues, to turn international law into the end-result of international politics or worse, into a tool to achieve political aims.

ELISABETH ZOLLER
Office of Legal Affairs
United Nations

Letters of Credit Under International Trade Law: UCC, UCP and Law Merchant. By Matti Kurkela. (New York, London, Rome: Oceana Publications, Inc., 1985. Pp. xiii, 517. Index. \$75.) The author attempts to clarify certain

¹ Her doctorate course (1971–1972): *Problèmes posés par les Organisations Internationales*, LES COURS DE DROIT, has now become a classic.

principles of private international law applicable to letters of credit. The main focus is not on the substantive rules of law, but on the interplay of the principal sets of rules that are applied by courts in common law countries:¹ the Uniform Commercial Code, the Uniform Customs and Practice for Documentary Credits, and the law merchant. With reference to these sets of rules (which may often overlap in application as well as coincide in substance), the author devotes most of his attention to analyzing an old legal conundrum—how to characterize the legal relationships formed among customers, intermediary banks and beneficiaries of letters of credit.² In the process, he also examines the choice-of-law rules that are used to determine the applicable law governing a letter of credit.

The study is well documented and the author shows considerable insight. However, the book suffers from a confused, disjointed style. Certain parts of it, such as the chapter on "Choice of Law in Light of Case Law," consist of a stringing together of materials, rather than an exercise in systematic analysis. As a consequence, this book is most likely to benefit persons with a thorough command of letter-of-credit law, who can use the text to find useful avenues of analysis that are suggested in it.

STEPHEN ZAMORA

University of Houston Law Center

Dreptul diplomatic. Relațiile, privilegiile și imunitățile diplomatice (The Law of Diplomacy. Diplomatic Relations, Prerogatives and Immunities). By Ion M. Anghel. (Bucharest: Editura științifică și enciclopedică, 1984. Pp. 707.) The subject matter of this book is the contemporary law of diplomacy. Its first part is devoted to general concepts such as the definition of diplomacy and the sources of its law, both in customary international law and as codified in the Vienna Convention. The second part deals with nine specific issues: (1) introductory considerations, (2) the immunity of diplomatic missions and diplomats from jurisdiction, (3) the inviolability of embassies, (4) the exemption from the obligation to testify, (5) the privileges of a mission and its members, (6) the facilities available to members, (7) the categories of persons who benefit from immunity, (8) the duration of immunity, and (9) the juridical status of diplomats in the territory of a third state.

Some aspects of the book should be noted. First, the author focuses on recent developments to the extent that the title of the book might well have been "The Contemporary Law of Diplomacy." This results in the underemphasis of such antecedents of the Vienna Convention of 1961 as Annex XVII of the Final Act of the 1815 Congress of Vienna, the Protocols of Aix-la-Chapelle (1818), the text adopted at the Cambridge session of the Institute of International Law in 1895, the 1907 Hague Convention and the 1928 Havana Convention regarding diplomatic agents, adopted at the sixth Pan-American Conference.

¹ The author focuses his discussion primarily on the decisions of courts in the United States, although his references to secondary sources are broader.

² The author prefers to view the letter of credit as consisting of two sets of contractual obligations: one involving a three-party contract among the customer, the issuing bank and the advising (or confirming) bank; and the other involving a contract between the beneficiary and the issuing bank (with the confirming bank added as a third party).

Second, the author asserts that there is an international legal right to have an embassy (p. 161), an opinion we do not share. The Vienna Convention did not legislate such a right, which would be contrary to the national sovereignty of states. No state can be forced to receive or accept an embassy. The interdependence of states does not entail limitations on sovereignty. We consider national sovereignty to be the irreducible element of international law.

Third, the author rightly stresses the question of breaking diplomatic relations, an act that only became frequent after World War II. He notes the differences between breaking off and suspending diplomatic relations. He states that breaking off diplomatic relations does not automatically bring about an end to consular, economic and cultural relations.

The author's research includes writings from both Western states and socialist countries. However, the foreign reader will find the treatment of Romanian authorities particularly interesting, especially the points of disagreement between the author and M. Malița and the analysis of the Decree Law of August 21, 1969 regarding the organization of the Ministry of Foreign Affairs.

BETINIO DIAMANT
Of the Romanian Bar

Yearbook of the International Institute of Humanitarian Law, 1984. Edited by G. J. L. Coles. (San Remo: International Institute of Humanitarian Law, 1985. Pp. 172.) This is the first yearbook of the International Institute of Humanitarian Law. It is intended to supplement the institute's program of activities, which include courses, symposiums and meetings of expert groups on the law of armed conflict, the protection of refugees and other topics. The institute was established in 1970, and has academic committees on migrations, refugee law, medical law, military instructions and the development of international humanitarian law.

This volume contains six feature articles, several short notes on current developments, progress reports on international humanitarian instruments, a section of reprints of recent documents (in particular, those of the UN High Commissioner for Refugees) and a report on the activities of the institute. A separate copy of the 1984 report of the institute's secretary-general is also included. Everything is in English save for two of the main articles, which are in French.

The strength of the *Yearbook* is its collecting of information on events in the field and actions taken by relevant organizations and countries. Even the main articles are quite reportorial, which is not to say that they are not useful. Those interested in human rights and humanitarian law would be well advised to include the *Yearbook* in their libraries, if only for its value as a reference work.

RICHARD W. NELSON
Of the District of Columbia Bar

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* Mention here neither assures nor precludes later review.

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OFFICIAL DOCUMENTS
U.S. IMPOSITION OF CEILINGS ON CERTAIN
UN DELEGATIONS

STATEMENT BY THE LEGAL COUNSEL*

1. In response to the request made by the distinguished representative of the Union of Soviet Socialist Republics, I would like to make the following observations on the issue under discussion.

2. From the outset, I would recall that, in the history of the Organization, no case has arisen where the host State has called for ceilings on, or reductions in, the size of missions accredited to the United Nations. This appears also to be true with respect to the specialized agencies. Thus, in the absence of practice, the matter has to be considered purely in the light of relevant rules and principles of international law.

3. In bilateral diplomatic relations, in the absence of specific agreement between the sending and the receiving State, it is for the receiving State to determine the size of a diplomatic mission which it is prepared to accept from a sending State. This is clearly reflected in article 11, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, which reads as follows:

“In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of the mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.”

Thus, in the absence of agreement regarding the size of a diplomatic mission, the receiving State may require limitations on the size of that mission. In making a determination to this effect, national security and other factors are doubtless taken into account, and the governing principle is one of reciprocity.

4. However, other considerations and procedures also have to be taken into account where missions to international organizations are concerned due to the fact that such missions are not accredited to the host country, and that consequently reciprocity is not possible. The test, which is embodied in article 14 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations, is an objective one. Article 14 provides that:

“The size of the mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State.”

While the 1975 Convention is not yet in force, this particular provision reflects a common consensus on the matter.

* Statement made by the Legal Counsel at the 115th meeting of the Committee on Relations with the Host Country, Mar. 13, 1986, UN Doc. A/AC.154/264 (1986).

5. The determination of what, in any particular case concerning missions to international organizations, is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State, again does not depend upon the considerations of the host State alone. Should the host State have any reservations regarding the size of a mission, such reservations are to be resolved through consultations and, if these fail, dispute settlement procedures. In this respect, the International Law Commission, in its commentary on what became article 14 of the 1975 Vienna Convention, observed that:

"... unlike the case of bilateral diplomacy, the members of missions to international organizations are not accredited to the host State. Nor are they accredited to the international organization in the proper sense of the word. As will be seen in different parts of the draft articles, remedy for the grievances which the host State or the organization may have against the permanent missions or one of its members cannot be sought in the prerogatives which derive from the fact that diplomatic envoys are accredited to the receiving State and from the latter's inherent right, in the final analysis, to refuse to maintain relations with the sending State. In the case of missions to international organizations, the principle of the freedom of the sending State in the composition of its mission and the choice of its members must be recognized in order to ensure the effective functioning of multilateral diplomacy. Remedies against any misuse of that freedom must be sought in the consultation and conciliation procedure[s]...".

6. The Headquarters Agreement of 1947 between the United Nations and the United States does not provide anything different. While not containing a specific provision on the size of missions, it reflects the principles just indicated by the International Law Commission in laying down in section 15(2) a procedure for determining the staff of missions to be accorded privileges and immunities in the host State. It refers to "such resident members of [the] staffs [of principal resident representatives] as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned" who shall "be entitled in the territory of the United States to the same privileges and immunities" as are accorded to diplomatic envoys accredited to the United States. Section 15(2) thus foresees agreement between the Secretary-General, the Government of the United States and the Government of the State concerned on staff to be assigned to missions. The legislative history of this provision indicates that it relates not only to the categories of staff concerned but also to the size of the mission. As the International Law Commission remarks in its commentary on article 14 of the 1975 Vienna Convention, section 15(2) of the Headquarters Agreement was drafted as a compromise to take account of the concern of the United States "that there should be some safeguard against too extensive an application". Neither implicitly nor explicitly does section 15(2), however, abandon the principle of proceeding collectively in resolving specific situations which may arise under that section.

7. Taking into account the legal analysis which I have just outlined, the Secretary-General has informed the Permanent Missions of the States concerned that, under the applicable law, the matter is one which requires consultations. The Secretary-General has expressed his readiness to be, even at this stage, of assistance in regard to such consultations.

CASE CONCERNING MILITARY AND PARAMILITARY
ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA *v.* UNITED STATES OF AMERICA)

INTERNATIONAL COURT OF JUSTICE

JUDGMENT OF THE COURT*

Operative part of the Court's Judgment

THE COURT

(1) By eleven votes to four,

Decides that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the "multilateral treaty reservation" contained in proviso (c) to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Oda, Ago, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Ruda, Elias, Sette-Camara and Ni.

(2) By twelve votes to three,

Rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(3) By twelve votes to three,

Decides that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State;

* The information reprinted below was communicated to the press by the Registry of the International Court of Justice as Communiqué No. 86/8, June 27, 1986, at 2-21. The Court was composed for the case as follows: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni, Evensen; *Judge ad hoc* Colliard.

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(4) By twelve votes to three,

Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983–1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(5) By twelve votes to three,

Decides that the United States of America, by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(6) By twelve votes to three,

Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(7) By fourteen votes to one,

Decides that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce

and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judge* Schwebel.

(8) By fourteen votes to one,

Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph (6) hereof, has acted in breach of its obligations under customary international law in this respect;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judge* Oda.

(9) By fourteen votes to one,

Finds that the United States of America, by producing in 1983 a manual entitled "Operaciones psicológicas en guerra de guerrillas", and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judge* Oda.

(10) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(11) By twelve votes to three,

Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(12) By twelve votes to three,

Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(13) By twelve votes to three,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judges* Oda, Schwebel and Sir Robert Jennings.

(14) By fourteen votes to one,

Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judge* Schwebel.

(15) By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

IN FAVOUR: *President* Nagendra Singh; *Vice-President* de Lacharrière; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; *Judge ad hoc* Colliard;

AGAINST: *Judge* Schwebel.

(16) Unanimously,

Recalls to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.

*Summary of the Judgment**I. Qualités (paras. 1 to 17)**II. Background to the dispute (paras. 18–25)**III. The non-appearance of the Respondent and Article 53 of the Statute (paras. 26–31)*

The Court recalls that subsequent to the delivery of its Judgment of 26 November 1984 on the jurisdiction of the Court and the admissibility of Nicaragua's Application, the United States decided not to take part in the present phase of the proceedings. This however does not prevent the Court from giving a decision in the case, but it has to do so while respecting the requirements of Article 53 of the Statute, which provides for the situation when one of the parties does not appear. The Court's jurisdiction being established, it has in accordance with Article 53 to satisfy itself that the claim of the party appearing is well founded in fact and law. In this respect the Court recalls certain guiding principles brought out in a number of previous cases, one of which excludes any possibility of a judgment automatically in favour of the party appearing. It also observes that it is valuable for the Court to know the views of the non-appearing party, even if those views are expressed in ways not provided for in the Rules of Court. The principle of the equality of the parties has to remain the basic principle, and the Court has to ensure that the party which declines to appear should not be permitted to profit from its absence.

IV. Justiciability of the dispute (paras. 32–35)

The Court considers it appropriate to deal with a preliminary question. It has been suggested that the questions of the use of force and collective self-defence raised in the case fall outside the limits of the kind of questions the Court can deal with, in other words that they are not justiciable. However, in the first place the Parties have not argued that the present dispute is not a "legal dispute" within the meaning of Article 36, paragraph 2, of the Statute, and secondly, the Court considers that the case does not necessarily involve it in evaluation of political or military matters, which would be to overstep proper judicial bounds. Consequently, it is equipped to determine these problems.

V. The significance of the multilateral treaty reservation (paras. 36–56)

The United States declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute contained a reservation excluding from the operation of the declaration

"disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

In its Judgment of 26 November 1984 the Court found, on the basis of Article 79, paragraph 7, of the Rules of Court, that the objection to jurisdiction based on the reservation raised "a question concerning matters of substance relating to the merits of the case" and that the objection did "not possess, in the circumstances of the case, an exclusively preliminary char-

acter". Since it contained both preliminary aspects and other aspects relating to the merits, it had to be dealt with at the stage of the merits.

In order to establish whether its jurisdiction was limited by the effect of the reservation in question, the Court has to ascertain whether any third States, parties to the four multilateral treaties invoked by Nicaragua, and not parties to the proceedings, would be "affected" by the Judgment. Of these treaties, the Court considers it sufficient to examine the position under the United Nations Charter and the Charter of the Organization of American States.

The Court examines the impact of the multilateral treaty reservation on Nicaragua's claim that the United States has used force in breach of the two Charters. The Court examines in particular the case of El Salvador, for whose benefit primarily the United States claims to be exercising the right of collective self-defence which it regards as a justification of its own conduct towards Nicaragua, that right being endorsed by the United Nations Charter (Art. 51) and the OAS Charter (Art. 21). The dispute is to this extent a dispute "arising under" multilateral treaties to which the United States, Nicaragua and El Salvador are Parties. It appears clear to the Court that El Salvador would be "affected" by the Court's decision on the lawfulness of resort by the United States to collective self-defence.

As to Nicaragua's claim that the United States has intervened in its affairs contrary to the OAS Charter (Art. 18) the Court observes that it is impossible to say that a ruling on the alleged breach of the Charter by the United States would not "affect" El Salvador.

Having thus found that El Salvador would be "affected" by the decision that the Court would have to take on the claims of Nicaragua based on violation of the two Charters by the United States, the Court concludes that the jurisdiction conferred on it by the United States declaration does not permit it to entertain these claims. It makes it clear that the effect of the reservation is confined to barring the applicability of these two multilateral treaties as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply, including customary international law.

VI. Establishment of the facts: evidence and methods employed by the Court
(paras. 57-74)

The Court has had to determine the facts relevant to the dispute. The difficulty of its task derived from the marked disagreement between the Parties, the non-appearance of the Respondent, the secrecy surrounding certain conduct, and the fact that the conflict is continuing. On this last point, the Court takes the view, in accordance with the general principles as to the judicial process, that the facts to be taken into account should be those occurring up to the close of the oral proceedings on the merits of the case (end of September 1985).

With regard to the production of evidence, the Court indicates how the requirements of its Statute—in particular Article 53—and the Rules of Court have to be met in the case, on the basis that the Court has freedom in estimating the value of the various elements of evidence. It has not seen fit to order an enquiry under Article 50 of the Statute. With regard to certain *documentary material* (press articles and various books), the Court has treated these with caution. It regards them not as evidence capable of proving facts,

but as material which can nevertheless contribute to corroborating the existence of a fact and be taken into account to show whether certain facts are matters of public knowledge. With regard to *statements by representatives of States*, sometimes at the highest level, the Court takes the view that such statements are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. With regard to the *evidence of witnesses* presented by Nicaragua—five witnesses gave oral evidence and another a written affidavit—one consequence of the absence of the Respondent was that the evidence of the witnesses was not tested by cross-examination. The Court has not treated as evidence any part of the testimony which was a mere expression of opinion as to the probability or otherwise of the existence of a fact not directly known to the witness. With regard in particular to *affidavits* and sworn *statements* made by members of a Government, the Court considers that it can certainly retain such parts of this evidence as may be regarded as contrary to the interests or contentions of the State to which the witness has allegiance; for the rest such evidence has to be treated with great reserve.

The Court is also aware of a publication of the United States State Department entitled “*Revolution Beyond Our Borders, Sandinista Intervention in Central America*” which was not submitted to the Court in any form or manner contemplated by the Statute and Rules of Court. The Court considers that, in view of the special circumstances of this case, it may, within limits, make use of information in that publication.

VII. *The facts imputable to the United States* (paras. 75 to 125)

1. The Court examines the allegations of Nicaragua that the *mining of Nicaraguan ports or waters* was carried out by United States military personnel or persons of the nationality of Latin American countries in the pay of the United States. After examining the facts, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States Government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

2. Nicaragua attributes to the direct action of United States personnel, or persons in its pay, operations against *oil installations, a naval base, etc.*, listed in paragraph 81 of the Judgment. The Court finds all these incidents except three, to be established. Although it is not proved that any United States military personnel took a direct part in the operations, United States agents participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.

3. Nicaragua complains of *infringement of its air space* by United States military aircraft. After indicating the evidence available, the Court finds that the only violations of Nicaraguan air space imputable to the United States

on the basis of the evidence are high altitude reconnaissance flights and low altitude flights on 7 to 11 November 1984 causing "sonic booms".

With regard to joint military manoeuvres with Honduras carried out by the United States on Honduran territory near the Honduras/Nicaragua frontier, the Court considers that they may be treated as public knowledge and thus sufficiently established.

4. The Court then examines the genesis, development and activities of the *contra* force, and the role of the United States in relation to it. According to Nicaragua, the United States "conceived, created and organized a mercenary army, the *contra* force". On the basis of the available information, the Court is not able to satisfy itself that the Respondent State "created" the *contra* force in Nicaragua, but holds it established that it largely financed, trained, equipped, armed and organized the FDN, one element of the force.

It is claimed by Nicaragua that the United States Government devised the strategy and directed the tactics of the *contra* force, and provided direct combat support for its military operations. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics solely devised by the United States. It therefore cannot uphold the contention of Nicaragua on this point. The Court however finds it clear that a number of operations were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer. It is also established in the Court's view that the support of the United States for the activities of the *contras* took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, etc. The evidence does not however warrant a finding that the United States gave direct combat support, if that is taken to mean direct intervention by United States combat forces.

The Court has to determine whether the relationship of the *contras* to the United States Government was such that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. The Court considers that the evidence available to it is insufficient to demonstrate the total dependence of the *contras* on United States aid. A partial dependency, the exact extent of which the Court cannot establish, may be inferred from the fact that the leaders were selected by the United States, and from other factors such as the organization, training and equipping of the force, planning of operations, the choosing of targets and the operational support provided. There is no clear evidence that the United States actually exercised such a degree of control as to justify treating the *contras* as acting on its behalf.

5. Having reached the above conclusion, the Court takes the view that the *contras* remain responsible for their acts, in particular the alleged violations by them of *humanitarian law*. For the United States to be legally responsible, it would have to be proved that that State had effective control of the operations in the course of which the alleged violations were committed.

6. Nicaragua has complained of certain measures of an economic nature taken against it by the Government of the United States, which it regards

as an indirect form of intervention in its internal affairs. Economic aid was suspended in January 1981; and terminated in April 1981, the United States acted to oppose or block loans to Nicaragua by international financial bodies; the sugar import quota from Nicaragua was reduced by 90 percent in September 1983; and a total trade embargo on Nicaragua was declared by an executive order of the President of the United States on 1 May 1985.

VIII. *The conduct of Nicaragua* (paras. 126–171)

The Court has to ascertain, so far as possible, whether the activities of the United States complained of, claimed to have been the exercise of collective self-defence, may be justified by certain facts attributable to Nicaragua.

1. The United States has contended that Nicaragua was *actively supporting armed groups operating in certain of the neighbouring countries*, particularly in El Salvador, and specifically in the form of the *supply of arms*, an accusation which Nicaragua has repudiated. The Court first examines the activity of Nicaragua with regard to El Salvador.

Having examined various evidence, and taking account of a number of concordant indications, many of which were provided by Nicaragua itself, from which the Court can reasonably infer the provision of a certain amount of aid from Nicaraguan territory, the Court concludes that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. Subsequently, evidence of military aid from or through Nicaragua remains very weak, despite the deployment by the United States in the region of extensive technical monitoring resources. The Court cannot however conclude that no transport of or traffic in arms existed. It merely takes note that the allegations of arms traffic are not solidly established, and has not been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

Even supposing it were established that military aid was reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that such aid is imputable to the authorities of Nicaragua, which has not sought to conceal the possibility of weapons crossing its territory, but denies that this is the result of any deliberate official policy on its part. Having regard to the circumstances characterizing this part of Central America, the Court considers that it is scarcely possible for Nicaragua's responsibility for arms traffic on its territory to be automatically assumed. The Court considers it more consistent with the probabilities to recognize that an activity of that nature, if on a limited scale, may very well be pursued unknown to the territorial government. In any event the evidence is insufficient to satisfy the Court that the Government of Nicaragua was responsible for any flow of arms at either period.

2. The United States has also accused Nicaragua of being responsible for *cross-border military attacks* on Honduras and Costa Rica. While not as fully informed on the question as it would wish to be, the Court considers as established the fact that certain trans-border military incursions are imputable to the Government of Nicaragua.

3. The Judgment recalls certain events which occurred at the time of the fall of President Somoza, since reliance has been placed on them by the United States to contend that the present Government of Nicaragua is in violation of certain alleged *assurances* given by its immediate predecessor.

The Judgment refers in particular to the "Plan to secure peace" sent on 12 July 1979 by the "Junta of the Government of National Reconstruction" of Nicaragua to the Secretary-General of the OAS, mentioning, *inter alia*, its "firm intention to establish full observance of human rights in our country" and "to call the first free elections our country has known in this century". The United States considers that it has a special responsibility regarding the implementation of these commitments.

IX. *The applicable law: customary international law* (paras. 172-182)

The Court has reached the conclusion (section V, *in fine*) that it has to apply the multilateral treaty reservation in the United States declaration, the consequential exclusion of multilateral treaties being without prejudice either to other treaties or other sources of law enumerated in Article 38 of the Statute. In order to determine the law actually to be applied to the dispute, it has to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

The Court, which has already commented briefly on this subject in the jurisdiction phase (*I.C.J. Reports 1984*, pp. 424 and 425, para. 73), develops its initial remarks. It does not consider that it can be claimed, as the United States does, that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. Even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Consequently, the Court is in no way bound to uphold customary rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying.

In response to an argument of the United States, the Court considers that the divergence between the content of the customary norms and that of the treaty law norms is not such that a judgment confined to the field of customary international law would not be susceptible of compliance or execution by the parties.

X. *The content of the applicable law* (paras. 183 to 225)

1. *Introduction: general observations* (paras. 183-186)

The Court has next to consider what are the rules of customary law applicable to the present dispute. For this purpose it has to consider whether a customary rule exists in the *opinio juris* of States, and satisfy itself that it is confirmed by practice.

2. *The prohibition of the use of force, and the right of self-defence* (paras. 187 to 201)

The Court finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations (Art. 2, para. 4, of the Charter). The Court has how-

ever to be satisfied that there exists in customary law an *opinio juris* as to the binding character of such abstention. It considers that this *opinio juris* may be deduced from, *inter alia*, the attitude of the Parties and of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". Consent to such resolutions is one of the forms of expression of an *opinio juris* with regard to the principle of non-use of force, regarded as a principle of customary international law, independently of the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

The general rule prohibiting force established in customary law allows for certain exceptions. The exception of the right of individual or collective self-defence is also, in the view of States, established in customary law, as is apparent for example from the terms of Article 51 of the United Nations Charter, which refers to an "inherent right", and from the declaration in resolution 2625 (XXV). The Parties, who consider the existence of this right to be established as a matter of customary international law, agree in holding that whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.

Whether self-defence be individual or collective, it can only be exercised in response to an "armed attack". In the view of the Court, this is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces. The Court quotes the definition of aggression annexed to General Assembly resolution 3314 (XXIX) as expressing customary law in this respect.

The Court does not believe that the concept of "armed attack" includes assistance to rebels in the form of the provision of weapons or logistical or other support. Furthermore, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which is a victim of the alleged attack, this being additional to the requirement that the State in question should have declared itself to have been attacked.

3. *The principle of non-intervention*, (paras. 202 to 209)

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. Expressions of an *opinio juris* of States regarding the existence of this principle are numerous. The Court notes that this principle, stated in its own jurisprudence, has been reflected in numerous declarations and resolutions adopted by international organizations and conferences in which the United States and Nicaragua have participated. The text thereof testifies to the acceptance by the United States and Nicaragua of a customary principle which has universal application. As to the content of the principle in customary law, the Court defines the constitutive elements which appear relevant in this case: a prohibited intervention must be one bearing on matters in which each State is permitted,

by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.

With regard to the practice of States, the Court notes that there have been in recent years a number of instances of foreign intervention in one State for the benefit of forces opposed to the government of that State. It concludes that the practice of States does not justify the view that any general right of intervention in support of an opposition within another State exists in contemporary international law; and this is in fact not asserted either by the United States or by Nicaragua.

4. *Collective counter-measures in response to conduct not amounting to armed attack* (paras. 210 and 211)

The Court then considers the question whether, if one State acts towards another in breach of the principle of non-intervention, a third State may lawfully take action by way of counter-measures which would amount to an intervention in the first State's internal affairs. This would be analogous to the right of self-defence in the case of armed attack, but the act giving rise to the reaction would be less grave, not amounting to armed attack. In the view of the Court, under international law in force today, States do not have a right of "collective" armed response to acts which do not constitute an "armed attack".

5. *State sovereignty* (paras. 212 to 214)

Turning to the principle of respect for State sovereignty, the Court recalls that the concept of sovereignty, both in treaty-law and in customary international law, extends to the internal waters and territorial sea of every State and to the air space above its territory. It notes that the laying of mines necessarily affects the sovereignty of the coastal State, and that if the right of access to ports is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce.

6. *Humanitarian law* (paras. 215 to 220)

The Court observes that the laying of mines in the waters of another State without any warning or notification is not only an unlawful act but also a breach of the principles of humanitarian law underlying the Hague Convention No. VIII of 1907. This consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Nicaragua has not expressly invoked the provisions of international humanitarian law as such, but has complained of acts committed on its territory which would appear to be breaches thereof. In its submissions it has accused the United States of having killed, wounded and kidnapped citizens of Nicaragua. Since the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the *contras*, the Court rejects this submission.

The question however remains of the law applicable to the acts of the United States in relation to the activities of the *contras*. Although Nicaragua has refrained from referring to the four Geneva Conventions of 12 August 1949, to which Nicaragua and the United States are parties, the Court con-

siders that the rules stated in Article 3 which is common to the four Conventions, applying to armed conflicts of a non-international character, should be applied. The United States is under an obligation to "respect" the Conventions and even to "ensure respect" for them, and thus not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3. This obligation derives from the general principles of humanitarian law to which the Conventions merely give specific expression.

7. *The 1956 treaty* (paras. 221 to 225)

In its Judgment of 26 November 1984, the Court concluded that it had jurisdiction to entertain claims concerning the existence of a dispute between the United States and Nicaragua as to the interpretation or application of a number of articles of the Treaty of Friendship, Commerce and Navigation signed at Managua on 21 January 1956. It has to determine the meaning of the various relevant provisions, and in particular of Article XXI, paragraphs 1 (c) and 1 (d), by which the Parties reserved the power to derogate from the other provisions.

XI. *Application of the law to the facts* (paras. 226 to 282)

Having set out the facts of the case and the rules of international law which appear to be in issue as a result of those facts, the Court has now to appraise the facts in relation to the legal rules applicable, and determine whether there are present any circumstances excluding the unlawfulness of particular acts.

1. *The prohibition of the use of force and the right of self-defence* (paras. 227 to 238)

Appraising the facts first in the light of the principle of the non-use of force, the Court considers that the laying of mines in early 1984 and certain attacks on Nicaraguan ports, oil installations and naval bases, imputable to the United States, constitute infringements of this principle, unless justified by circumstances which exclude their unlawfulness. It also considers that the United States has committed a *prima facie* violation of the principle by arming and training the *contras*, unless this can be justified as an exercise of the right of self-defence.

On the other hand, it does not consider that military manoeuvres held by the United States near the Nicaraguan borders, or the supply of funds to the *contras*, amounts to a use of force.

The Court has to consider whether the acts which it regards as breaches of the principle may be justified by the exercise of the right of collective self-defence, and has therefore to establish whether the circumstances required are present. For this, it would first have to find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica, since only such an attack could justify reliance on the right of self-defence. As regards El Salvador, the Court considers that in customary international law the provision of arms to the opposition in another State does not constitute an armed attack on that State. As regards Honduras and Costa Rica, the Court states that, in the absence of sufficient information as to the trans-border incursions into the territory of those two States from Nicaragua, it is difficult to decide whether they amount, singly or collectively, to an armed attack by Nicaragua. The Court finds that neither these incursions nor the alleged

supply of arms may be relied on as justifying the exercise of the right of collective self-defence.

Secondly, in order to determine whether the United States was justified in exercising self-defence, the Court has to ascertain whether the circumstances required for the exercise of this right of collective self-defence were present, and therefore considers whether the States in question believed that they were the victims of an armed attack by Nicaragua, and requested the assistance of the United States in the exercise of collective self-defence. The Court has seen no evidence that the conduct of those States was consistent with such a situation.

Finally, appraising the United States activity in relation to the criteria of necessity and proportionality, the Court cannot find that the activities in question were undertaken in the light of necessity, and finds that some of them cannot be regarded as satisfying the criterion of proportionality.

Since the plea of collective self-defence advanced by the United States cannot be upheld, it follows that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts referred to in the first paragraph of this section.

2. *The principle of non-intervention* (paras. 239 to 245)

The Court finds it clearly established that the United States intended, by its support of the *contras*, to coerce Nicaragua in respect of matters in which each State is permitted to decide freely, and that the intention of the *contras* themselves was to overthrow the present Government of Nicaragua. It considers that if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow its government, that amounts to an intervention in its internal affairs, whatever the political objective of the State giving support. It therefore finds that the support given by the United States to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. Humanitarian aid on the other hand cannot be regarded as unlawful intervention. With effect from 1 October 1984, the United States Congress has restricted the use of funds to "humanitarian assistance" to the *contras*. The Court recalls that if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of another State, it must be limited to the purposes hallowed in the practice of the Red Cross, and above all be given without discrimination.

With regard to the form of indirect intervention which Nicaragua sees in the taking of certain action of an economic nature against it by the United States, the Court is unable to regard such action in the present case as a breach of the customary law principle of non-intervention.

3. *Collective counter-measures in response to conduct not amounting to armed attack* (paras. 246 to 249)

Having found that intervention in the internal affairs of another State does not produce an entitlement to take collective counter-measures involving the use of force, the Court finds that the acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

4. *State sovereignty* (paras. 250 to 253)

The Court finds that the assistance to the *contras*, the direct attacks on Nicaraguan ports, oil installations, etc., the mining operations in Nicaraguan ports, and the acts of intervention involving the use of force referred to in the Judgment, which are already a breach of the principle of non-use of force, are also an infringement of the principle of respect for territorial sovereignty. This principle is also directly infringed by the unauthorized overflight of Nicaraguan territory. These acts cannot be justified by the activities in El Salvador attributed to Nicaragua; assuming that such activities did in fact occur, they do not bring into effect any right belonging to the United States. The Court also concludes that, in the context of the present proceedings, the laying of mines in or near Nicaraguan ports constitutes an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce.

5. *Humanitarian law* (paras. 254 to 256)

The Court has found the United States responsible for the failure to give notice of the mining of Nicaraguan ports.

It has also found that, under general principles of humanitarian law, the United States was bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of common Article 3 of the four Geneva Conventions of 12 August 1949. The manual on "Psychological Operations in Guerrilla Warfare", for the publication and dissemination of which the United States is responsible, advises certain acts which cannot but be regarded as contrary to that article.

6. *Other grounds mentioned in justification of the acts of the United States* (paras. 257 to 269)

The United States has linked its support to the *contras* with alleged breaches by the Government of Nicaragua of certain solemn commitments to the Nicaraguan people, the United States and the OAS. The Court considers whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States in response to the alleged violations. With reference to the "Plan to secure peace" put forward by the Junta of the Government of National Reconstruction (12 July 1979), the Court is unable to find anything in the documents and communications transmitting the plan from which it can be inferred that any legal undertaking was intended to exist. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system. Furthermore the Respondent has not advanced a legal argument based on an alleged new principle of "ideological intervention".

With regard more specifically to alleged violations of human rights relied on by the United States, the Court considers that the use of force by the United States could not be the appropriate method to monitor or ensure respect for such rights, normally provided for in the applicable conventions. With regard to the alleged militarization of Nicaragua, also referred to by the United States to justify its activities, the Court observes that in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

7. *The 1956 Treaty* (paras. 270 to 282)

The Court turns to the claims of Nicaragua based on the Treaty of Friendship, Commerce and Navigation of 1956, and the claim that the United States has deprived the Treaty of its object and purpose and emptied it of real content. The Court cannot however entertain these claims unless the conduct complained of is not "measures . . . necessary to protect the essential security interests" of the United States, since Article XXI of the Treaty provides that the Treaty shall not preclude the application of such measures. With regard to the question what activities of the United States might have been such as to deprive the Treaty of its object and purpose, the Court makes a distinction. It is unable to regard all the acts complained of in that light, but considers that there are certain activities which undermine the whole spirit of the agreement. These are the mining of Nicaraguan ports, the direct attacks on ports, oil installations, etc., and the general trade embargo.

The Court also upholds the contention that the mining of the ports is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX of the Treaty. It also concludes that the trade embargo proclaimed on 1 May 1985 is contrary to that article.

The Court therefore finds that the United States is *prima facie* in breach of an obligation not to deprive the 1956 Treaty of its object and purpose (*pacta sunt servanda*), and has committed acts in contradiction with the terms of the Treaty. The Court has however to consider whether the exception in Article XXI concerning "measures . . . necessary to protect the essential security interests" of a Party may be invoked to justify the acts complained of. After examining the available material, particularly the Executive Order of President Reagan of 1 May 1985, the Court finds that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, and the general trade embargo of 1 May 1985, cannot be justified as necessary to protect the essential security interests of the United States.

XII. *The claim for reparation* (paras. 283 to 285)

The Court is requested to adjudge and declare that compensation is due to Nicaragua, the quantum thereof to be fixed subsequently, and to award to Nicaragua the sum of 370.2 million US dollars as an interim award. After satisfying itself that it has jurisdiction to order reparation, the Court considers appropriate the request of Nicaragua for the nature and amount of the reparation to be determined in a subsequent phase of the proceedings. It also considers that there is no provision in the Statute of the Court either specifically empowering it or debarring it from making an interim award of the kind requested. In a case in which one Party is not appearing, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. The Court therefore does not consider that it can accede *at this stage* to this request by Nicaragua.

XIII. *The provisional measures* (paras. 286 to 289)

After recalling certain passages in its Order of 10 May 1984, the Court concludes that it is incumbent on each Party not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law.

XIV. *Peaceful settlement of disputes; the Contadora process* (paras. 290 to 291)

In the present case the Court has already taken note of the Contadora process, and of the fact that it had been endorsed by the United Nations Security Council and General Assembly, as well as by Nicaragua and the United States. It recalls to both Parties to the present case the need to co-operate with the Contadora efforts in seeking a definitive and lasting peace in Central America, in accordance with the principle of customary international law that prescribes the peaceful settlement of international disputes, also endorsed by Article 33 of the United Nations Charter.

*Summary of the Opinions appended to the Judgment of the Court**

Separate Opinion of Judge Nagendra Singh, President

The operative part paragraph 292 (16) of the Judgment adopted unanimously by the Court which enjoins parties to seek a peaceful solution of their disputes in accordance with international law, really rests on the due observance of two basic principles: namely that of non-use of force in inter-State relations and that of non-intervention in the affairs of other States. This in the President's view is the main thrust of the Judgment of the Court rendered with utmost sincerity to serve the best interests of the community.

In fact, the cardinal principle of non-use of force in international relations has been the pivotal point of a time-honoured legal philosophy that has evolved particularly after the two world wars of the current century. The Charter provisions as well as the Latin American Treaty System have not only developed the concept but strengthened it to the extent that it would stand on its own, even if the Charter and the Treaty basis were held inapplicable in this case. The obvious explanation is that the original customary aspect which has evolved with the treaty law development has come now to stay and survive as the existing modern concept of international law, whether customary, because of its origins, or "a general principle of international law recognized by civilized nations". The contribution of the Court has been to emphasize the principle of non-use of force as one belonging to the realm of *jus cogens* and hence as the very cornerstone of the human effort to promote peace in a world torn by strife. Force begets force and aggravates conflicts, embitters relations and endangers peaceful resolution of the dispute.

There is also the key doctrine of non-intervention in the affairs of States which is equally vital for the peace and progress of humanity being essentially needed to promote the healthy existence of the community. The principle of non-intervention is to be treated as a sanctified absolute rule of law.

States must observe both these principles namely that of non-use of force and that of non-intervention in the best interests of peace and order in the community. The Court has rightly held them both as principles of customary international law although sanctified by treaty law, but applicable in this case in the former customary manifestation having been reinvigorated by being further strengthened by the express consent of States particularly the Parties in dispute here. This must indeed have all the weight that law could ever command in any case.

* The information reprinted below was issued by the International Court of Justice as Annex to Press Communiqué No. 86/8, June 27, 1986.

The decision of the Court is in the result of a collegiate exercise reached after prolonged deliberation and a full exchange of views of no less than fifteen Judges who, working according to the Statute and Rules of the Court, have examined the legal arguments and all the evidence before it. In this, as in all other cases, every care has been taken to strictly observe the procedures prescribed and the decision is upheld by a clear majority. What is more, the binding character of the Judgment under the Statute (Art. 59) is made sacrosanct by a provision of the UN Charter (Art. 94): all Members of the United Nations have undertaken an obligation to comply with the Court's decisions addressed to them and to always respect the validity of the Judgment.

Separate Opinion of Judge Lachs

Judge Lachs begins by drawing attention to the requirements of the Statute in respect of the personal qualities and diversity of origin that must characterize Members of the Court, and deprecates any aspersion upon their independence.

On the substance of the Judgment he would have preferred more attention to be given to foreign assistance to the opposition forces in El Salvador, and different formulae to have been used in various places.

Judge Lachs returns to some aspects of jurisdiction, considering that insufficient weight had previously been given to the forty years that had elapsed before any public objection had been raised against the validity of Nicaragua's acceptance of the Court's jurisdiction. When that validity had been privately questioned in connection with a case in the mid-1950's, action should have been taken by the United Nations: Nicaragua should have been asked to complete any necessary formalities and, if it failed to do so, would have been removed from the list of States subject to the compulsory jurisdiction of the Court. The United Nations having taken no action, it was legitimate to view the imperfection as cured by acquiescence over a very long period. The jurisdiction of the Court based on the FCN Treaty of 1956 gave no cause for doubt.

Judge Lachs also deals with the question of the justiciability of the case: the close relationship between legal and political disputes, as between law and politics. International law today covers such wide areas of international relations that only very few domains—for instance, the problem of disarmament, or others, specifically excluded by States—are not justiciable. He specifically instances the case concerning *United States Diplomatic and Consular Staff in Tehran*.

Referring to the Court's refusal to grant a hearing to El Salvador at the jurisdictional stage, Judge Lachs states that he has come to view it as a judicial error which does not, however, justify any unrelated conclusions.

The broad confrontation between the Parties should, in Judge Lachs's view, be settled within the framework of the Contadora Plan, in co-operation with all States of the region. The area, torn by conflicts, suffering from under-development for a long time, requires a new approach based on equal consideration of the interests of all concerned in the spirit of good-neighbourly relations.

Separate Opinion of Judge Ruda

The separate Opinion of Judge Ruda deals with four subjects. In the first place, Judge Ruda does not accept the reservation expressed by the United States in the letter dated 18 January 1985 "in respect of any decision by the Court regarding Nicaragua's claims". In Judge Ruda's view, pursuant to Article 94, paragraph 1, of the Charter of the United Nations, the Member States of the United Nations have formally accepted the obligation to comply with the Court's decisions.

The second part of the Opinion refers to the Vandenberg Amendment. Judge Ruda voted against the application of the Amendment, for the reasons stated in the separate Opinion which he submitted in 1984.

In the third part, Judge Ruda deals with the question of self-defence. He explains that his conclusions are the same as those reached by the Court, but in his view it is not necessary to enter into all the factual details, because assistance to rebels is not *per se* a pretext for self-defence from the legal point of view.

The fourth part is devoted to the reasons why Judge Ruda, despite having voted in 1984 against the Treaty of Friendship, Commerce and Navigation as a basis of the Court's jurisdiction, believes he is bound to vote on the substantive issues submitted to the Court on this subject.

Separate Opinion of Judge Elias

Judge Elias considers that, following the Court's Judgment in the jurisdictional phase, the multilateral treaty reservation attached to the United States declaration accepting jurisdiction under the Optional Clause was left in abeyance and had no further relevance unless El Salvador, Honduras or Costa Rica intervened in the phase on merits and reparation. For the Court to have applied it was therefore incorrect and tantamount to invoking a power to revise its decision on jurisdiction and admissibility on behalf of non-parties to the case.

Separate Opinion of Judge Ago

While subscribing to the Judgment as a whole and approving in particular the position adopted by the Court concerning the United States' multilateral treaty reservation, Judge Ago remains hesitant about certain points. For example, he feels that the Court made a somewhat too hasty finding as to the quasi-identity of substance between customary international law and the law enshrined in certain major multilateral treaties of universal character, and was also somewhat too ready to see the endorsement of certain principles by UN and OAS resolutions as proof of the presence of those principles in the *opinio juris* of members of the international community. Judge Ago also feels obliged to draw attention to what he views as some partially contradictory aspects of the Court's assessment of the factual and legal situation. He further considers that some passages of the Judgment show a paucity of legal reasoning to support the Court's conclusions as to the imputability of certain acts to the Respondent *qua* acts giving rise to international responsibility, and would have preferred to see the Court include a more explicit confirmation of its case-law on this subject.

Separate Opinion of Judge Sette-Camara

Judge Sette-Camara fully concurs with the Judgment because he firmly believes that "the non-use of force as well as non-intervention—the latter as a corollary of equality of States and self-determination—are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States". His separate opinion deals only with subparagraph (1) of the operative part, against which he has voted. He maintains that the multilateral treaty reservation, appended to the United States 1946 Declaration of Acceptance of the Jurisdiction of the Court according to Article 36, paragraph 2, of the Statute, cannot be applied to the present case, since none of the decisions taken in the operative part can in any way "affect" third States, and in particular El Salvador. The case is between Nicaragua and the United States and the binding force of the Court's decision is confined to these two Parties. Judge Sette-Camara recognizes the right of any State making Declarations of Acceptance to append to them whatever reservations it deems fit. However, he contends that the Court is free, and indeed bound, to interpret those reservations. He regrets that the application of the multilateral treaty reservation debarred the Court from resting the Judgment on the provisions of the Charter of the United Nations and the Charter of the Organization of American States, and forced it to resort only to principles of customary international law and the bilateral Treaty of Friendship, Commerce and Navigation of 1956. He submits that the law applied by the Judgment would be clearer and more precise if the Court had resorted to the specific provisions of the relevant multilateral conventions.

Separate Opinion of Judge Ni

Judge Ni's primary concern, as expressed in his separate opinion, is with respect to the "multilateral treaty reservation" invoked by the United States. In his view, any acceptance of its applicability entailed (1) the exclusion of the Court from exercising jurisdiction insofar as Nicaragua's claims were based on the multilateral treaties in question, and (2) the preclusion, if the case was on other grounds still in the Court for adjudication of the merits, of the application of such multilateral treaties. In the instant case, however, the United States, while invoking the multilateral treaty reservation to challenge the exercise of jurisdiction by the Court, had in the meantime persistently claimed that the multilateral treaties, which constitute the very basis of its reservation, should alone be applied to the case in dispute. That claim amounted in effect to a negation of its own reservation and, taking into account all the relevant circumstances, ought to have been considered as a waiver of the multilateral treaty reservation. Such being the case, Judge Ni differed from the majority of the Court in that he considered that the rules contained in multilateral treaties, as well as customary international law, should, where appropriate, have been applied to the case.

Dissenting Opinion of Judge Oda

Judge Oda agrees with the Court's recognition of the applicability of the multilateral treaty proviso attached to the United States' 1946 declaration but considers that, having thus decided that the dispute had arisen under a

multilateral treaty, it should have ceased to entertain the application of Nicaragua on the basis of that declaration. The Court had been wrong to interpret the exclusion of the dispute by that proviso as merely placing restrictions upon the sources of law to which it was entitled to refer.

Judge Oda further believes that, to the extent that the Nicaraguan claims presupposed the Court's jurisdiction under declarations made pursuant to Article 36(2) of the Statute, which refers to "legal disputes", they should have been declared non-justiciable, since the dispute was not "legal" within the meaning and intention of that clause or, even if it were, it was not one that the Court could properly entertain: as a political dispute, it was more suitable for resolution by other organs and procedures. Moreover, the facts the Court could elicit by examining the evidence in the absence of the Respondent fell far short of what was needed to show a complete picture.

Judge Oda thus considers that, in so far as the Court could properly entertain the case, it could do so on the basis of Article 36(1) of the Statute, where the term "all matters specially provided for in . . . treaties . . . in force" gave no such grounds for questioning the "legal" nature of the dispute. The Court could therefore legitimately examine any breach of the concrete terms of the 1956 Treaty of Friendship, Commerce and Navigation. In Judge Oda's view, the mining of the Nicaraguan ports had constituted such a breach, for which the United States had incurred responsibility.

Judge Oda emphasizes that his negative votes on many counts of the Judgment must not be interpreted as implying that he is opposed to the rules of law concerning the use of force or intervention, of whose violation the United States has been accused, but are merely a logical consequence of his convictions on the subject of jurisdiction under Article 36(2) of the Statute.

Finally, Judge Oda regrets that the Court has been needlessly precipitate in giving its views on collective self-defence in its first Judgment to broach that subject.

Dissenting Opinion of Judge Schwebel

Judge Schwebel dissented from the Court's Judgment on factual and legal grounds. He agreed with the Court in its holdings against the United States for its failure to make known the existence and location of mines laid by it and its causing publication of a manual advocating acts in violation of the law of war. But Judge Schwebel concluded that the United States essentially acted lawfully in exerting armed pressures against Nicaragua, both directly and through its support of the *contras*, because Nicaragua's prior and sustained support of armed insurgency in El Salvador was tantamount to an armed attack upon El Salvador against which the United States could react in collective self-defence in El Salvador's support.

Judge Schwebel found that, since 1979, Nicaragua had assisted and persisted in providing large-scale, vital assistance to the insurgents in El Salvador. The delictual acts of Nicaragua had not been confined to providing the Salvadoran rebels with large quantities of arms, munitions and supplies, which of themselves arguably might be seen as not tantamount to armed attack. Nicaragua had also joined with the Salvadoran rebels in the orga-

nization, planning and training for their acts of insurgency, and had provided them with command-and-control facilities, bases, communications and sanctuary which enabled the leadership of the Salvadoran rebels to operate from Nicaraguan territory. That scale of assistance, in Judge Schwebel's view, was legally tantamount to an armed attack. Not only was El Salvador entitled to defend itself against that armed attack; it had called upon the United States to assist it in the exercise of collective self-defence. The United States was entitled to do so, through measures overt or covert. Those measures could be exerted not only in El Salvador but against Nicaragua on its own territory.

In Judge Schwebel's view, the Court's conclusion that the Nicaraguan Government was not "responsible for any flow of arms" to the Salvadoran insurgents was not sustained by "judicial or judicious" considerations. The Court had "excluded, discounted and excused the unanswerable evidence of Nicaragua's major and maintained intervention in the Salvadoran insurgency". Nicaragua's intervention in El Salvador in support of the Salvadoran insurgents was, Judge Schwebel held, admitted by the President of Nicaragua, affirmed by Nicaragua's leading witness in the case, and confirmed by a "cornucopia of corroboration".

Even if, contrary to his view, Nicaragua's actions in support of the Salvadoran insurgency were not viewed as tantamount to an armed attack, Judge Schwebel concluded that they undeniably constituted unlawful intervention. But the Court, "remarkably enough", while finding the United States responsible for intervention in Nicaragua, failed to recognize Nicaragua's prior and continuing intervention in El Salvador.

For United States measures in collective self-defence to be lawful, they must be necessary and proportionate. In Judge Schwebel's view, it was doubtful whether the question of necessity in this case was justiciable, because the facts were so indeterminate, depending as they did on whether measures not involving the use of force could succeed in terminating Nicaragua's intervention in El Salvador. But it could reasonably be held that the necessity of those measures was indicated by "persistent Nicaraguan failure to cease armed subversion of El Salvador".

Judge Schwebel held that "the actions of the United States are strikingly proportionate. The Salvadoran rebels, vitally supported by Nicaragua, conduct a rebellion in El Salvador; in collective self-defence, the United States symmetrically supports rebels who conduct a rebellion in Nicaragua. The rebels in El Salvador pervasively attack economic targets of importance in El Salvador; the United States selectively attacks economic targets of military importance" in Nicaragua.

Judge Schwebel maintained that, in contemporary international law, the State which first intervenes with the use of force in another State—as by substantial involvement in the sending of irregulars onto its territory—is, *prima facie*, the aggressor. Nicaragua's status as *prima facie* aggressor can only be confirmed upon examination of the facts. "Moreover", Judge Schwebel concluded, "Nicaragua has compounded its delictual behaviour by pressing false testimony on the Court in a deliberate effort to conceal it. Accordingly, on both grounds, Nicaragua does not come before the Court with clean hands. Judgment in its favour is thus unwarranted, and would be unwar-

ranted even if it should be concluded—as it should not be—that the responsive actions of the United States were unnecessary or disproportionate.”

Dissenting Opinion of Judge Sir Robert Jennings

Judge Sir Robert Jennings agreed with the Court that the United States multilateral treaty reservation is valid and must be respected. He was unable to accept the Court's decision that it could, nevertheless, exercise jurisdiction over the case by applying customary law in lieu of the relevant multilateral treaties. Accordingly, whilst able to vote in favour of certain of the Court's findings, he felt compelled to vote against its decisions on the use of force, on intervention, and on the question of self-defence, because in his view the Court was lacking jurisdiction to decide those matters.

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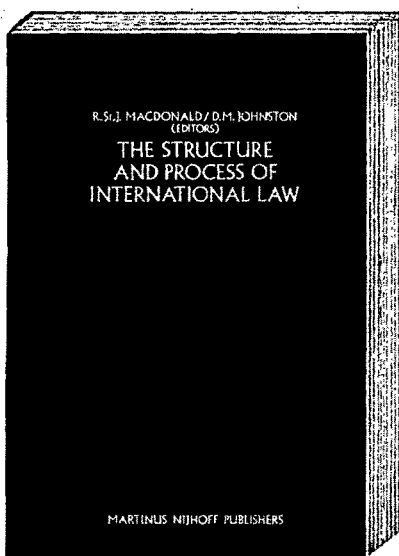
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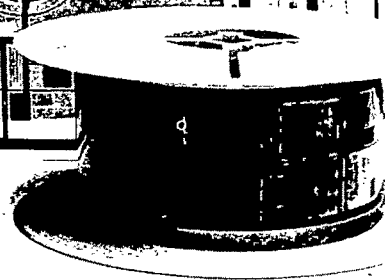
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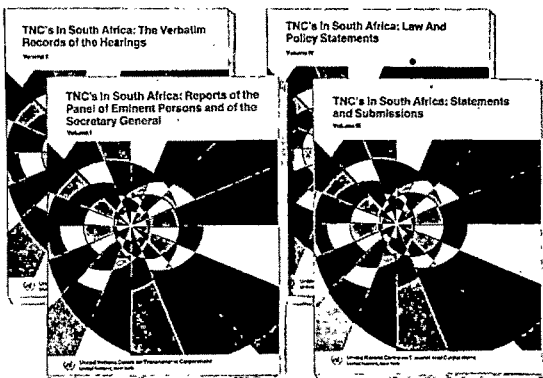
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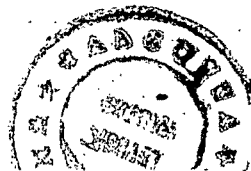
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THE COLLAPSE OF TIN: RESTRUCTURING A FAILED COMMODITY AGREEMENT

*By Eric J. McFadden**

I. INTRODUCTION

The International Tin Agreement (ITA), one of the world's oldest commodity pacts, ran out of money and discontinued its market support operations on October 24, 1985. Subsequent disclosures revealed that the organization not only had exhausted its cash reserves but also had borrowed over £900 million in an unsuccessful effort to support the price of tin. Member governments of the ITA failed to approve additional contributions to repay these loans, leaving banks and commodity brokers to absorb massive losses. The market price of tin plummeted to half its previous level. The collapse came as an unexpected shock, for the ITA had been widely viewed as the world's most successful commodity pact. International agreements operating almost continuously during the past 50 years, including the ITA and its precursors, have been credited with successfully reducing fluctuations in the naturally volatile price of tin. The collapse now makes the whole future of tin regulation uncertain. In addition, the failure of tin sounds a warning for other commodity pacts, which are equally susceptible to the underlying weaknesses to which tin fell prey.

The ITA is one of over a dozen international commodity pacts that have operated in recent years. These various intergovernmental organizations have taken the form either of producer cartels or of agreements including both producers and consumers. The most celebrated of the producer cartels is the Organization of Petroleum Exporting Countries (OPEC), but producer associations have also been formed, for example, for bananas, bauxite, copper and iron ore. The ITA, in contrast to the producer cartels, allots equal voting strength to consumers and producers (although three large producers and the world's largest consumer, the United States, are not members). Agreements including producers and consumers have also regulated coffee, wheat, sugar, rubber, olive oil and cocoa.¹

Commodity pacts have generally relied on either export controls or a buffer stock, or a combination of the two, to regulate markets. Export controls require first that the appropriate combined total of exports be deter-

* J.D., Harvard University, 1986; M.A., Oxford University, 1985.

¹ On international commodity pacts, see generally C. JOHNSTON, *LAW AND POLICY ON INTERGOVERNMENTAL PRIMARY COMMODITY AGREEMENTS* (loose-leaf, 1976-1985); K. KHAN, *THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS* (1982); E. ERNST, *INTERNATIONAL COMMODITY AGREEMENTS* (1982); P. HALLWOOD, *STABILIZATION OF INTERNATIONAL COMMODITY MARKETS* (Contemporary Studies in Economic and Financial Analysis vol. 18, 1979).

mined and then that the permitted exports be allocated among the participating producers. Allocation is usually based primarily on past export performance, but any set formula may require revision to reflect changes in relative production capacity, special currency needs of some countries or simply uneven bargaining power among producers. The determination of export allocations tends to be the greatest source of conflict among producers. The use of an international buffer stock raises different problems. A buffer stock, generally consisting of a quantity of the commodity and a cash reserve, is used to regulate the market by buying and selling the commodity. The most important issues are the size of the buffer stock, who finances it (i.e., producers alone, or producers and consumers together) and the mechanism by which buy-and-sell decisions are made. The ITA uses a combination of export controls and a buffer stock.

The appropriate goals of commodity pacts have been a source of constant debate. Producers and consumers naturally tend to serve at least partially conflicting interests. Consumers have generally contended that the goal of an organization should be to restrict short-term price fluctuations and to guarantee an orderly supply of the commodity. Producers, however, have often been more concerned to maintain prices at what they view as a fair level, which is generally defined as an appropriate margin above production cost. The majority of producers are less-developed countries, and increasingly they have also argued that higher commodity prices should be one aspect of a general worldwide program to transfer wealth from the developed countries to the less-developed countries. The conflict in the ITA between producers and consumers, and the recent failure to cooperate in pursuing common goals, became a major factor in the collapse of tin.

This paper will describe that collapse, trace the history of tin regulation and outline the key provisions of the current Sixth ITA (1982-1987). Then it will analyze the underlying causes of the collapse and suggest reforms to strengthen the ITA and prevent a future breakdown. The Sixth ITA is scheduled to expire in June 1987. Major reforms will be required if a new Seventh ITA or some other successor organization is to take its place and carry on the largely successful history of tin regulation.

II. THE COLLAPSE OF THE INTERNATIONAL TIN AGREEMENT

On October 24, 1985, Pieter de Koning, the buffer stock manager of the International Tin Council (ITC), announced to the London Metal Exchange (LME) that he had insufficient funds to honor his contracts. It had been his job to use the ITC's resources to maintain the market price of tin between the floor and ceiling prices set by the ITC, the executive arm of the International Tin Agreement. In defending the official floor price, it later turned out, the ITC, acting through de Koning, had not only depleted the cash reserves of the buffer stock but also financed futures purchases through broker and bank loans amounting to £900 million. The ITC tin stockpile, including physical metal and contracts for future delivery, had grown to

over 100,000 tons, equivalent to over 6 months' world consumption. The LME, the world's largest tin market, suspended trading in tin immediately after de Koning announced that the ITC had run out of money.²

The LME, which in the end discontinued tin trading permanently, was severely threatened by the ITC's failure to honor its debts. In the tradition of its 19th-century origin, the LME had no clearinghouse; each broker owed obligations directly to another. Under that system, the failure of one broker endangered each of his creditors. When tin trading was suspended, the price stood at £8,140 per ton; it was feared that if the ITC was unable to cover its debts, large amounts of tin held as collateral for ITC loans would be released onto the market and push the price as low as £4,000. Such a severe drop, it was felt, might bankrupt some LME members who held long positions in tin for clients. Many LME members, assuming the credit worthiness of the ITC and its 22 member governments, had executed purchases for the buffer stock manager almost entirely on credit. Unlike United States exchanges, the LME had no required margin percentages. After the suspension of tin trading, volume in the metals traded on the LME dropped by about half, as traders hesitated to commit funds to brokers whose financial condition was uncertain.³

Banks were also affected. Having taken about 40,000 tons of tin as collateral for loans to the buffer stock manager, they faced the prospect that the collateral might be worth up to £100 million less than the amount of the loans. The possible losses were not large enough to threaten insolvency, but bankers were also concerned about the precedent established by the refusal of the ITC members to honor the obligations of an intergovernmental organization.⁴

² On the initial suspension of trading, see *LME Suspends Trading in Tin*, Am. Metal Market, Oct. 25, 1985, at 1, col. 1; *Tin without Emotion*, 305 MINING J. 333 (Nov. 1, 1985); Wagstyl, Sherwell & Sulong, *Tin Trade Suspended Until Council Meets Next Week*, Fin. Times, Oct. 26, 1985, at 1, col. 3; *Death Rattle of an Old Tin Market?*, ECONOMIST, Nov. 2, 1985, at 81.

The Kuala Lumpur Tin Market, which handled lower volume than the LME and does not trade in futures contracts, also suspended trading. It reopened on Feb. 3, 1986, although the ITC reportedly still owes two Malaysian banks a total of over \$200 million advanced to finance the buffer stock. *A Blunt Tin Opener*, FAR E. ECON. REV., Feb. 20, 1986, at 74. The Kuala Lumpur Tin Market had failed to become a major competitor of the LME partly because it allows no futures trading and partly because it allows trading only in Malaysian tin. It is now taking steps to modify the latter requirement by allowing trading in Indonesian and Thai tin. *News Briefs*, Am. Metal Market, June 19, 1986, at 2, col. 3. If it continues to relax restrictions in the future, it will increase its importance in the international tin market.

³ On the threat to the LME, see Putka & Truell, *Tin Crisis in London Roils Metal Exchange; Big Losses May Result*, Wall St. J., Nov. 13, 1985, at 1, col. 6; *Tin Men in Search of a Wizard*, ECONOMIST, Nov. 9, 1985, at 91.

Under pressure from the British Government, following the crisis, the LME established a committee to coordinate the formation of a clearinghouse. *LME Restructuring*, 306 MINING J. 405 (June 6, 1986); Salak, *LME Clearing House Unit Suggests Extending Contract Delivery Dates*, Am. Metal Market, June 4, 1986, at 4, col. 1.

⁴ On the position of the banks, see *Tin Problems Just Beginning?*, 306 MINING J. 185 (Mar. 14, 1986); *Tin Men in Search of a Wizard*, *supra* note 3, at 91.

For several months following the collapse, representatives of the ITC's 22 member governments tried to resolve the financial situation so that an orderly market could be reestablished. The ITC was bankrupt, and approval to levy new contributions from members required a unanimous vote of the member governments. Despite lengthy negotiations, however, two producers—Indonesia and Thailand—refused to approve new contributions. The ITC thus defaulted on its £900 million debt. Some of the debt was secured by collateral in the form of tin, but losses by brokers and bankers nevertheless ran into the hundreds of millions of British pounds.⁵

When the negotiations finally collapsed, the LME acted quickly. It announced that the trading of tin would be terminated permanently after more than a century, and it set a fixed settlement price for all outstanding tin contracts of £6,250 per ton. This settlement price was a loss-spreading compromise—less than the £8,140 price prevailing when trading was suspended, but well above that of private transactions reported at the time, which was in the £4,000–5,000 range (metal continued to change hands privately after the suspension of LME trading). The settlement price was criticized by traders holding short positions who claimed that the LME was depriving them of their legitimate gains by discriminating in favor of those who were “long” in the metal.⁶

The legal situation was unclear in the wake of the ITC's default and the imposition by the LME of a fixed settlement price. Not only is the ITC itself bankrupt, but in addition it claims to be immune from prosecution as an intergovernmental body. The individual ITC members also appear to be shielded on the basis of sovereign immunity, although that shield will certainly be tested. Moreover, suits will probably question the authority of the LME to impose an arbitrary settlement price.⁷

The ITA is not the only commodity pact that has faltered recently. OPEC, most notably, was forced by market conditions to abandon export and price

⁵ The negotiations among member governments to bail out the ITC were marked by a lack of commitment on almost all sides. Britain alone pushed hard for an agreement, for as the home of the LME it had much to lose. Individual LME brokers faced large potential losses. The threatened exchange produced £200 million in annual revenues, and Britain also feared that a default would lead to further repercussions in London financial circles. Consumer countries for the most part blamed producer countries for having insisted on the unrealistically high floor price, which the buffer stock manager had ultimately found impossible to defend. Producer countries, particularly Indonesia and Thailand, saw no point in contributing valuable foreign exchange to support a plan, intended primarily to compensate brokers and banks, that they believed would merely smooth the inevitable fall in the tin price. Negotiations ended in March 1986, when Indonesia and Thailand notified the ITC that they would not participate in the rescue plan. See *All Chocks Are Away*, FAR E. ECON. REV., Mar. 20, 1986, at 154; *Tin: Not So NewCo*, ECONOMIST, Feb. 22, 1986, at 74; *Tin Problems Just Beginning?*, *supra* note 4, at 185.

⁶ *LME Terminates Tin Trading*, 306 MINING J. 186 (Mar. 14, 1986); *Tin Goes to Court*, ECONOMIST, Mar. 15, 1986, at 77; Wagstyl, *Paying the Price of the Market's Collapse*, Fin. Times, Mar. 12, 1986, at 16, col. 3.

⁷ *Tin: All In, and Only Two Out*, ECONOMIST, Apr. 26, 1986, at 87; Hughes, *The Tin Crisis Goes to Court*, Fin. Times, Mar. 13, 1986, at 40, col. 1; *Tin Goes to Court*, *supra* note 6, at 77; *Tin Problems Just Beginning?*, *supra* note 4, at 185.

controls.⁸ Although the Tin Agreement differs from OPEC and other producer cartels by giving consumers and producers equal voting strength, in the past few years the ITC has behaved like a producer cartel, placing export quotas on its members and defending an unrealistically high floor price for a long period. The problems encountered by OPEC and the ITC are typical of those that cartels may face when attempting to fix prices and limit exports. An understanding of the collapse of tin will contribute to the solution of related problems faced by other commodity pacts.

III. HISTORY OF TIN MARKET REGULATION

The ITA, formed in 1956, was preceded by international cooperation in the tin market dating back to 1921. It is the only nonagricultural commodity agreement that includes consumers as well as producers. The basis for this historic cooperation is the need for stabilization in the tin market, which has been subject to extreme price volatility caused by recurring wide gaps between production and consumption.⁹

The effect of the chronic imbalance in supply is aggravated by the short-term inelasticity of demand for tin.¹⁰ This causes small changes in production or consumption to result in large changes in price. The reason for its inelasticity of demand is that tin generally constitutes a very minor component of finished products. Thus, even a substantial change in the price of tin has little effect on the price of a product in which it is used.

The largest use of tin is in tin-plated steel, accounting for about 40 percent of total consumption. Most of the plate is used to make food and beverage containers (tin cans). The cost of the tin, however, amounts to less than 2 percent of the cost of tin plate. The second largest use of tin is in solder, which accounts for about 25 percent of consumption. Although tin consti-

⁸ Several agricultural commodities have also experienced at least temporary steep declines. The International Rubber Organization nearly went bankrupt in 1985 in its effort to defend a floor price before a bad harvest pushed prices up. Cocoa and coffee also dropped temporarily below official floors in 1985. *Commodity Cartels Rig Wrongly*, *ECONOMIST*, Dec. 21, 1985, at 91.

Part of the difficulty of rubber stemmed indirectly from the collapse of tin. In view of the looming loan defaults by the ITC, bankers became concerned that governments would not back the obligations of the intergovernmental organizations to which they belonged; so bankers were unwilling to accept stockpile rubber, which they feared might fall in price, as collateral for loans to finance additional rubber purchases. Clad, *Tin's Off-Market Forces*, *FAR E. ECON. REV.*, Dec. 1985, at 86, 87. In retrospect, the bankers' concerns appear to have had some justification, since the two countries most directly responsible for the ITC default, Indonesia and Thailand, are also major rubber producers.

⁹ Even when the depression and World War II are excluded from consideration, gaps have ranged from a surplus of 45% of consumption in 1921, to a deficit of 23% of consumption in 1959. The gap between consumption and production has exceeded 5% in two-thirds of the years from 1910 to 1978. T. WITZIG, *OPERATION OF THE INTERNATIONAL TIN AGREEMENT* 2 (Bureau of Mines Information Circular No. 8860, 1981).

¹⁰ No study has conclusively measured short-term elasticity, since the many variables operating concurrently on the market price make the calculation difficult. Estimates have ranged from 0.1 to 0.6. W. BALDWIN, *THE WORLD TIN MARKET* 103-08 (1983); T. WITZIG, *supra* note 9, at 2.

tutes about 80 percent of the cost of solder, solder is only a minor element in most finished products. There is less than a dollar's worth of solder in a television set. One of the few finished products with a high percentage of tin is pewter, but its manufacture is unlikely ever to become a major use.¹¹ The small cost of tin as a percentage of the cost of a finished product means that a change in the price of tin does not greatly affect the quantity demanded in the short term. It should be kept in mind, however, that long-term demand appears to be much more elastic.¹² Tin pacts have generally attempted to dampen the wide price fluctuations that result from the short-term inelasticity and chronic imbalance in the supply of tin.

The first formal agreement among tin-producing countries was the Bandoeng Pool formed in 1921. Postwar demand for tin began to slacken, while high levels of production and renewed availability of shipping facilities were increasing the available supply. The tin price dropped rapidly during 1920 and 1921. Representatives of the colonial governments of the Federated Malay States (now Malaysia) and the Netherlands Indies (now Indonesia) and the private smelter at Singapore met secretly and agreed to keep off the market the stocks that each had accumulated in unsuccessful attempts to support prices. The partners later liquidated their stocks in an orderly fashion in 1923–1924, a period of rising consumption and prices. This first cooperative effort to influence the market was perceived as a success and encouraged the development of intergovernmental agreements, which have marked all but a few years of the subsequent period up to the present day.¹³

The 1920s were a seesaw period for tin. Prices began to decline in 1927, and the drop became precipitous with the 1929 crash. In July 1929, a group of companies representing 20 percent of world production formed a Tin Producers' Association, but the failure of its voluntary production restraints led the major producing countries to organize the International Tin Control Scheme in 1931. The original members were the Federated Malay States, Nigeria, Bolivia and the Netherlands East Indies; Thailand joined later. The basic objective, to be implemented by a newly formed International Tin Committee, was to restrict exports through the assignment of quotas. The first agreement lasted until 1934, when it was replaced by the second agreement (1934–1937), which acquired the Belgian Congo, French Indochina, Portugal and Britain as new members. A third agreement, with Portugal and Britain withdrawing, ran from 1937 to 1941. A fourth was signed for

¹¹ W. BALDWIN, *supra* note 9, at 49–55; *Tin: Potty*, *ECONOMIST*, Nov. 16, 1985, at 101, 102. On the uses of tin, see also W. ROBERTSON, *TIN: ITS PRODUCTION AND MARKETING* (Contributions in Economics and Economic History No. 51, 1982); Rogers, *Falling Consumption to Stabilize*, *Am. Metal Market*, July 26, 1985, at 7, col. 1 (special issue on tin).

¹² Estimates of long-term elasticity of demand range from 1.1 to 1.3 (excepting one extremely divergent estimate of 5.0). W. BALDWIN, *supra* note 9, at 104–08. In the long term, tin usage is subject to reduction by conservation, substitution and recycling. See *infra* part V, "Inflexible Official Price Range."

¹³ W. FOX, *TIN: THE WORKING OF A COMMODITY AGREEMENT* 112–17 (1974) (the best historical source generally on tin regulation, written by the ITC Secretary from 1956 to 1971); W. BALDWIN, *supra* note 9, at 65–67.

the years 1942–1946, but during the war the Allies Combined War Materials Board handled the allocation of tin.¹⁴

The International Tin Committee's membership was limited to producers, and it functioned as a producers' cartel. Overall, it was successful in stabilizing the market during the depression by limiting exports to keep production and consumption in near balance. The key to this success was the inclusion of all major producers, although the original members paid a price to lure nonmember producers into the fold. Those countries joining after the initiation of the agreement were able to insist upon generous terms in the form of high quotas for their own production.¹⁵

The present ITA is an outgrowth of the International Tin Study Group of 1948–1956. Both the United States and Britain supported the study group's establishment, and producers agreed to the delay in forming a new tin pact because postwar scarcity and U.S. stockpiling purchases seemed to guarantee strong demand for some time. The International Tin Study Group produced four drafts of a tin agreement, and the final one was adopted as the first ITA. While conferences had been held under the auspices of the United Nations, the final Agreement was independent of it. In a spirit of postwar cooperation, the ITA included producers and consumers. Both groups were instrumental in drafting the Agreement, and it was designed to offer advantages to each.¹⁶ The Agreement also established control machinery, with the ITC as the executive arm. The ITC became responsible for managing a buffer stock and setting export quotas. The first ITA ran from 1956 to 1961.¹⁷

Despite its active role in the International Tin Study Group and the 1953 International Tin Conference, the United States did not sign the first ITA.

¹⁴ W. FOX, *supra* note 13, at 129–90; W. BALDWIN, *supra* note 9, at 67–74.

¹⁵ W. FOX, *supra* note 13, at 129–90; W. BALDWIN, *supra* note 9, at 67–74. It also appears that the British Government, acting through the Colonial Office, played an active role in preserving unity. The British Commonwealth produced about 43% of the world's tin and smelted about 84%. Britain's territorial interests linked it with the high-cost producers of Nigeria as well as the low-cost producers of Malaya, and Britain's smelters relied on the extremely high-cost Bolivian ore. It was in British interests to avoid a disruptive price war that might have forced some of these producers from the market, so Britain played a major part in advocating restriction.

¹⁶ The objectives were stated in Article I:

- (a) To prevent or alleviate widespread unemployment or under-employment and other serious difficulties which are likely to result from maladjustments between the supply of and the demand for tin;
- (b) To prevent excessive fluctuations in the price of tin and to achieve a reasonable degree of stability of price on a basis which will secure long-term equilibrium between supply and demand;
- (c) To ensure adequate supplies of tin at reasonable prices at all times; and
- (d) To provide a framework for the consideration and development of measures to promote the progressively more economic production of tin while protecting tin deposits from unnecessary waste or premature abandonment.

International Tin Agreement, 1953, Art. I, *included in* United Nations Tin Conference, 1950 and 1953, UN Doc. E/CONF.12/12 (1954).

¹⁷ International Tin Agreement, *supra* note 16; W. FOX, *supra* note 13, at 205–311; W. BALDWIN, *supra* note 9, at 74–84.

The crucial consideration, and one that has played a continuing role in the U.S. relationship to the ITC, was the nation's strategic stockpile of tin. As the world's largest consumer, but one lacking any major tin deposits of its own, the United States began to build a stockpile in 1944 to assure availability for essential wartime activities. The United States continued to make large-scale purchases until 1956. When the stockpile reached its peak in 1960, the inventory stood at 349,000 tons, almost twice the world's consumption that year and almost seven times the annual consumption of the United States.¹⁸ Producing countries were understandably concerned that large or ill-timed sales from the stockpile might drive prices down, and the first ITA consequently placed limits on governmental sales of noncommercial stocks.¹⁹ The crucial factor in the decision by the United States not to join the first ITA was its unwillingness to accept this constraint on managing its stockpile.

The Second ITA (1961–1966) was little changed from the first. The concern over possible liquidation of the stockpile continued. A major modification in the voting procedure provided that most important decisions, which had required a distributed simple majority for approval in the first ITA, would require a distributed two-thirds in the second. This change, which has been carried over in part to the present Sixth ITA, had the effect of giving near veto power to a very large producer or consumer.²⁰

The operative provisions of the Third ITA (1966–1971) remained virtually the same, although the objectives were rewritten to reflect a shift in the goals of the producing countries. Mention was made of increasing the export earnings of developing countries and achieving a "remunerative return to producers."²¹

For the most part, the Fourth ITA (1971–1976) again served as a continuation. A significant change, however, resulted in the liberal allowance of discretion to the buffer stock manager,²² which became a factor in the 1985 collapse.

¹⁸ T. WITZIG, *supra* note 9, at 8; W. FOX, *supra* note 13, at 226–42. Since the early 1960s, the United States has gradually sold "surplus" tin from the stockpile, reducing the total to about 175,000 tons at present.

¹⁹ Article XIV of the first ITA provided:

Participating Governments . . . [s]hall not dispose of non-commercial stocks of tin except upon six months' public notice, stating reasons for disposal, the quantity to be released, the plan of disposal, and the date of the availability of the tin. Such disposal shall protect producers and consumers against avoidable disruption of their usual markets. A Participating Government wishing to dispose of such stocks shall, at the request of the Council or of any other Participating Government which considers itself substantially interested, consult as to the best means of avoiding substantial injury to the economic interests of producing and consuming countries. The Participating Government shall give due consideration to any recommendation of the Council upon the case.

International Tin Agreement, 1953, *supra* note 16, Art. XIV.

²⁰ Second International Tin Agreement, *included in* United Nations Tin Conference, 1960, UN Doc. E/CONF.32/5 (1961); W. BALDWIN, *supra* note 9, at 84–86.

²¹ Third International Tin Agreement, *included in* United Nations Tin Conference, 1965, UN Doc. TD/TIN.3/5 (1965).

²² Fourth International Tin Agreement, *included in* United Nations Tin Conference, 1970, UN Doc. TD/TIN.4/7/Rev.1 (1970).

Few changes were made for the Fifth ITA (1976–1982), but the United States became a member for the first and only time. The U.S. decision apparently stemmed from concern about the recently more aggressive posture taken by developing countries. OPEC had demonstrated the potential power of commodity cartels in 1973, and the UN General Assembly had declared a “New International Economic Order” in 1974. The United States hoped its influence would keep the ITA from going the way of OPEC.²³

From the first International Tin Control Scheme in 1931 until the mid-1970s, tin pacts were successful. Price fluctuations under the ITA, in particular, were confined to a much narrower range than those experienced in previous, unregulated periods. Even up until the 1985 collapse, the ITA was hailed as a shining success.²⁴ In the long run, consumers and producers both benefited from a more stable market.

Starting in the mid-1970s, however, disagreement between producers and consumers became more evident, and maneuvering by individual countries and factions contributed to instability in the tin market. At the end of the recession year of 1975, export controls were in effect, and the buffer stock held 20,071 tons of physical tin. Prices had risen substantially by the March 1976 ITC meeting. The ITC, however, apparently impressed by producers’ arguments that the cost of production had risen sharply, voted to raise the price range while *retaining* export controls. At a special May meeting, the price range was raised again and the export controls still remained in place. In June the export controls were finally lifted, and the ITC announced that the buffer stock had dropped to 2,820 tons of physical tin and that buffer stock operations were being suspended. Thus, for several months, export controls had been used to discourage production while 17,000 tons of tin were sold from the buffer stock, which effectively left the buffer stock manager with no means to dampen any subsequent price rise. By January 1977, the buffer stock was exhausted, and from then into 1979, the market price remained above the ITC ceiling despite three further rises in the price range. Consumers blamed the high prices on the producers’ earlier insistence on retaining export controls even in the face of expanding

²³ Fifth International Tin Agreement, included in United Nations Tin Conference, 1975, UN Doc. TD/TIN.5/11 (1976), reprinted in C. JOHNSTON, *supra* note 1, Binder 2, App. IV.8.01; W. BALDWIN, *supra* note 9, at 92–94; U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES: THE FIFTH INTERNATIONAL TIN AGREEMENT—ISSUES AND POSSIBLE IMPLICATIONS (1976). On the feared profusion of commodity cartels in the wake of OPEC’s success, see the three articles in FOREIGN POL’Y, Spring 1974, at 57 (Mikdashi, *Collusion Could Work*; Krasner, *Oil Is the Exception*; Bergsten, *The Threat Is Real*).

²⁴ On the successful control of price fluctuations, see W. FOX, *supra* note 13, at 389. Fox analyzes short-term price fluctuations for 1924–1970, concluding that “[i]n general . . . it can be properly claimed that the post-war agreements have substantially smoothed down short-term fluctuations.” See also *The Great Tin Crash*, ECONOMIST, Nov. 2, 1985, at 15, 16 (“the tin agreement was, until this week, bragged about as the great success among the international commodity agreements”); Bleiberg, *Tin in a Box*, BARRON’S, Nov. 18, 1985, at 11, col. 1 (“the ITA for years was widely hailed as a shining example”); W. FOX, *supra* note 13, at 397 (“the weapons of the tin agreement have been justified”).

demand. At the very least, the experience demonstrated that the buffer stock was too small to dampen a major price rise.²⁵

From its entry in 1976 until 1980, the United States worked consistently to limit official increases in the price range to levels at which the ceiling was almost always below the market price. This strategy eliminated the possibility of export controls or buffer stock purchases because under ITA rules, price support mechanisms were not allowed when the market price was above the official ceiling. Producers protested vehemently that, in the face of rising production costs, the ITC was being crippled by an unrealistically low price range made possible solely by the requirement that it could only be changed with the approval of a two-thirds distributed majority. The United States made clear that it opposed export controls and favored a larger buffer stock as an alternative, but it left itself open to the charge of inconsistency by opposing compulsory consumer contributions to the buffer stock and refusing to make a voluntary contribution itself. The U.S. confrontationist strategy was largely responsible for widening the gulf between producing and consuming countries.²⁶

The conflict intensified in 1981, when a mystery buyer, later discovered to be backed by the Malaysian Government, began pushing up prices by making massive acquisitions on the LME. The scheme was apparently a response to the consumers' refusal to agree to an increase in the ITC price range. Purchases by the buyer were estimated at over 60,000 tons, but when the operation was discontinued in February 1982, the tin price plummeted below the ITC floor. Ample production and a weakening world economy combined to help defeat the Malaysian effort to drive up the price.²⁷

Later in 1982, Malaysia, the world's largest tin producer, threatened to pull out of the ITA and called a meeting with Indonesia and Thailand to discuss a separate producers' association. Indonesia and Thailand did not want to form a cartel in place of the ITA but went along with Malaysia's plans in order to keep Malaysia from pulling out of the ITA. In 1983 the Association of Tin Producing Countries was established by Malaysia, Thailand, Indonesia, Australia, Bolivia, Nigeria and Zaire. The association was not intended to replace the ITA and thus far has played mainly a symbolic role. It has no explicit mechanism to set export quotas or influence the tin market, and it has taken no significant actions.²⁸

²⁵ W. BALDWIN, *supra* note 9, at 94-95.

²⁶ *Id.* at 95-96.

²⁷ Chaikin, *Evidence of Market Manipulation in Tin Has Emerged*, 3 COMPANY L. 27 (1982); Shao & Behrmann, *Tin-Price Crisis Threatens to Cause Rift Between Consuming, Producing Nations*, Wall St. J., Feb. 24, 1982, at 42, col. 2; *Tin: Swapping Cartels*, ECONOMIST, June 26, 1982, at 81.

²⁸ Agreement Establishing the Association of Tin Producing Countries, *done* Mar. 29, 1983, 23 ILM 1009 (1984). On the initial formation of the association, see *Tin: Swapping Cartels*, *supra* note 27, at 81. Several factors make the success of a producer cartel, if one is attempted, very unlikely. Tin is subject to conservation, substitution and recycling; therefore, an artificially high price would lead to a decrease in consumption. The number of producers is large enough and disparate enough that some would be tempted to remain outside a cartel as "free riders." Even governments have difficulty controlling exports by their private producers. Finally, the United States could use its massive stockpile to supply the market and drive down prices.

From the end of the Fifth ITA in 1982 until the 1985 collapse, the ITC was engaged in an effort to support the tin price. Export controls operated throughout the period, and the buffer stock manager had to purchase tin almost continuously to keep the price from falling below the floor. These efforts finally failed.

Tin regulation has a long history of success. Only in the last decade has the pursuit by producers and consumers of their short-term interests damaged their efforts at stabilization. The future of the ITA depends on the willingness of all parties to set their sights on long-term benefits so as to rekindle the spirit of cooperation.

IV. THE SIXTH INTERNATIONAL TIN AGREEMENT

Although the Sixth ITA (1982-1987) once again resembles its predecessor,²⁹ the United States is not a member, and the Agreement operates provisionally. Ratification by 80 percent of both producers and consumers is required to bring the Agreement into definitive force, and this level has not been met. In view of the 1985 collapse, the Sixth ITA appears certain to remain in only provisional force until its expiration in June 1987. The ITC made initial plans in 1985 to negotiate a Seventh ITA, but its future is now uncertain.³⁰

Votes in the ITC are split equally between producers on the one hand, and consumers on the other; and within each group they are apportioned according to net production or consumption as a percentage of the world total. The producer members of the Sixth ITA, and their production percentages determined at the outset of the Sixth ITA, are: Malaysia (35.2%), Thailand (19.3%), Indonesia (18.7%), Australia (6.0%), Zaire (1.8%) and Nigeria (1.4%). Bolivia, which has long been a major producer (its initial ITA apportionment was 15.6%), did not join; nor did Brazil and China, both of which have recently become important exporters. The major consumer members, and their consumption percentages determined at the outset of the Sixth ITA, are: Japan (17.2%), the Federal Republic of Germany (7.8%), the United Kingdom (5.8%), France (5.5%) and Italy (3.4%). The United States, the largest consumer (with an initial Sixth ITA apportionment of 26.9%), is conspicuously absent.³¹

²⁹ Sixth International Tin Agreement, UN Doc. TD/TIN.5/14/Rev.1 (1982), reprinted in C. JOHNSTON, *supra* note 1, Binder 2, App. IV.8.02.

³⁰ UN Conference on Trade and Development, Decision of Meeting Convened under Article 55(3) of the Sixth International Tin Agreement, UN Doc. TD/TIN.6/15 (1982) (putting the Sixth ITA into force provisionally); Muhamad, *Tin: The Market May Never Be the Same After a Year of Trauma*, ENGINEERING & MINING J., March 1986, at 61.

A proposal has already been put before the ITC to create a small tin study group to succeed the ITA upon its expiration in June 1987. The study group would gather data on tin production and consumption for the use of members in planning output and usage. Replacing the ITA with such a study group would effectively end the regulation of tin. Salak, *Study Group May Replace Tin Council*, Am. Metal Market, June 3, 1986, at 1, col. 4.

³¹ Sixth International Tin Agreement, *supra* note 29, Art. 14 and Ann. A. Votes are reapportioned annually and whenever any change in membership or in the category of a member occurs.

Like previous ITAs, the Sixth ITA has two main operational mechanisms: the use of a buffer stock and the application of export controls. In previous ITAs, the buffer stock was financed by producers only, but in the Sixth ITA contributions are assessed equally from producers and consumers. The operation of the buffer stock is related to floor and ceiling prices fixed by the ITC. The ceiling price is 30 percent above the floor price, and the range between them is divided into three equal segments. The buffer stock manager's actions are governed by whether the market price is above the official ceiling, in one of the three segments within the official range or below the official floor:

3. If the market price of tin:

(a) Is equal to or greater than the ceiling price, the Manager shall, unless instructed by the Council to operate otherwise and subject to articles 29 and 31, offer for sale at the market price on recognized markets such tin as is at his disposal until the market price of tin falls below the ceiling price or the tin at his disposal is exhausted;

(b) Is in the upper sector of the range between the floor and ceiling prices, the Manager may operate on recognized markets at the market price in order to prevent the market price from rising too steeply, provided he is a net seller of tin;

(c) Is in the middle sector of the range between the floor and ceiling prices, the Manager may operate only if so authorized by a two-thirds distributed majority of the Council;

(d) Is in the lower sector of the range between the floor and ceiling prices, the Manager may operate on recognized markets at the market price in order to prevent the market price from falling too steeply, provided he is a net buyer of tin; or

(e) Is equal to or less than the floor price, the Manager shall, unless instructed by the Council to operate otherwise, if he has funds at his disposal and subject to articles 29 and 31, offer to buy tin on recognized markets at the market price until the market price of tin is above the floor price or the funds at his disposal are exhausted.³²

These regulations apparently give the manager very broad discretion as they include no stated limitation on the types of transactions he may engage in. It is unclear, for example, what kinds of futures contracts, if any, are contemplated under the regulations. Losses in futures contracts became a key factor in the 1985 collapse.

The second operational mechanism is the application of export controls. Controls may be applied, according to a complex formula, only when a certain high percentage of the buffer stock is held in tin metal and only when the price of tin is at a low level defined in relation to the floor price. When these conditions are met, the ITC may declare a period of export controls. Permissible exports are then apportioned among producers in accordance with their recent production or export figures.³³

The United States did not join the Sixth ITA for several reasons. First,

³² *Id.*, Art. 28(3).

³³ *Id.*, Arts. 32-34. A formula taking into account the tin price and the percentage of physical tin in the buffer stock determines whether a simple distributed majority or a two-thirds distributed majority is required to declare a control period.

although the United States has generally shown sensitivity to producers' concerns about sales from its stockpile, the Government wished to maintain its independence of action. Article 46 of the Sixth ITA requires official consultation prior to any sale from a noncommercial stockpile. Second, the Sixth ITA, under Article 22, for the first time requires buffer stock contributions from consumer members, which must be made in money rather than in tin. The United States certainly would have been more amenable to contributing surplus tin from its stockpile than cash. Third, the United States has been consistently critical of the ITA for many years, but it has been unable to induce the organization to make structural changes. It has sought such major modifications as the abandonment of export controls, the augmentation of the buffer stock and an increase in the range between the floor and ceiling prices. Finally, membership in the Fifth ITA adversely affected U.S. foreign relations. The United States not only failed to achieve its goals, but raised bitter resentment among some tin producers for what were seen as its confrontationist tactics.³⁴ The United States declined membership in view of these several factors.

Despite the reservations of the United States, tin regulation has proved valuable over the long term by restricting fluctuations in the naturally volatile price of the metal. Producers and consumers will both suffer if the Sixth ITA is allowed to expire without a successor. Major reforms are certainly necessary, however, and the present situation provides an ideal climate in which to evaluate the causes of the collapse of tin and to make basic changes. Recent events have demonstrated the inadequacy of the system, and a fundamental restructuring is necessary if the ITA is to be saved.

V. CAUSES OF THE COLLAPSE AND RECOMMENDED REFORMS

Inflexible Official Price Range

An analysis of the 1985 collapse reveals several structural weaknesses in the ITA that require attention if it is to survive as a major market force. Most notable is the lack of flexibility, in practice, of the official price range. The range is set by a simple distributed majority vote of the ITC. Unfortunately, the ITC has shown itself too insensitive to market forces to set appropriate prices. From 1982 to 1985, a period when tin production exceeded consumption, failure to lower the floor in line with the market required the buffer stock manager to buy tin almost constantly to protect the floor.³⁵ The result was exhaustion of reserves and ultimately default by the

³⁴ See *Tin: Swapping Cartels*, *supra* note 27, at 81; W. BALDWIN, *supra* note 9, at 95-96.

³⁵ The floor price, which since 1972 has been set in Malaysian dollars, remained unchanged at M\$29.15/kg from the introduction of the Sixth ITA in 1982 until the 1985 collapse. The Malaysian dollar, however, is tied to the U.S. dollar, which rose for most of the 1982-1985 period. Despite the unchanged floor price, therefore, the tin price rose in relation to most currencies. The British pound was especially weak during much of that period; therefore, the price on the LME, denominated in British pounds, had to be pushed up almost continuously to keep it in line with the floor set in Malaysian dollars. One proposed method of moderating the influence of currency fluctuations is to set the official range according to a basket of currencies. See Williamson, *Weak Prices to Reflect Persistent Market Woes*, *Am. Metal Market*, July 26, 1985, at 10, col. 1 (special issue on tin); *Tin without Emotion*, *supra* note 2, at 333.

ITC. Similarly, but with less disastrous consequences, the failure of the ITC to raise the range sufficiently in the 1976–1978 period, at the instigation of the United States, kept the ceiling below the market price for an extended period.

Any attempt to maintain an artificial price in the tin market is vulnerable to market forces that are naturally strengthened in proportion to the effort to control price. If the price is held low, consumption is encouraged, exploration for new sources and marginal production are discouraged, and recycling becomes less economical. Thus the price tends to increase. If price is kept artificially high, opposite effects are created: conservation and substitution, higher production and more recycling. During the support effort in 1982–1985, consumption fell and production rose.³⁶

In the long term, the effects of conservation and substitution work against any effort to maintain an artificially high price. Conservation and substitution have been important factors in the demand for tin. Improved techniques of tin-plating have produced the greatest advances in conservation. The old “hot dip” method of plating steel has been gradually replaced by ever-improving electrolytic processes that apply a much thinner coating of tin. More efficient processes might actually be a boon for tin in the long run, however, because they help keep it competitive with aluminum, its most challenging rival. Aluminum has already largely replaced tin-plated steel in soft drink and beer cans, and the industry is now in the early stages of an effort to penetrate the food can market. Plastic containers and the increased production of frozen foods also can substitute for the use of tin. Tin appears likely to maintain its importance in solder and certain chemicals, but the outlook for its consumption overall is at best stable.³⁷ An artificially supported price can have only a negative long-term effect on the consumption of tin.

The production level seems to be very sensitive to the market price. Production rose dramatically among nonmembers, particularly Brazil and China, during the support effort. Bolivia, another nonmember, maintained a high level of production. (Even Britain’s extremely high-cost Cornish tin mines were able to increase production profitably.³⁸) The ITC, by supporting the

³⁶ *Hard Times for Tin Mines*, 305 MINING J. 125, 126 (Aug. 23, 1985). On the role of substitution, the relationship between the price of primary tin and the quantity of secondary tin recycled has not been conclusively established. A study comparing tin prices and secondary tin production in the United States from 1922 to 1940 found that “the recovery of secondary tin is markedly responsive to changes in the price of virgin tin, but this responsiveness operates only within a certain range.” It is estimated that secondary tin accounts for about 4% of world consumption. W. ROBERTSON, *supra* note 11, at 118–23 (quoting K. KNORR, *TIN UNDER CONTROL* 40 (1945)).

³⁷ Rogers, *supra* note 11.

³⁸ *Tin Mines Tragedy*, 305 MINING J. 389 (Nov. 22, 1985). These production jumps, even in high-cost mines, throw doubt on the repeated claims of producers that their operations are profitable only with strong support prices. Consumers point out that producers’ stated “cost” often includes the taxes and royalties paid to the government by the mining companies. W. BALDWIN, *supra* note 9, at 97; *Impact of Tin Prices on Producers*, 305 MINING J. 355 (Nov. 8, 1985). On taxation of mining, see generally M. GILLIS, M. BUCOVETSKY, G. JENKINS, U. PETERSEN, L. WELLS & B. WRIGHT, *TAXATION AND MINING* (1978).

market price at an artificially high level, was essentially subsidizing the production of nonmembers.

The ITC's attempts to maintain an artificial price over the long term reflect a desire to control the long-term price of tin regardless of market forces. This is an unrealistic goal, particularly in view of the increase in production and the decrease in consumption that accompany a high price. Any effort to maintain a high price will likely result in a wide swing in the opposite direction once the attempt fails, because an artificially high price encourages slack consumption and heavy production, both of which then adjust only gradually to a subsequent sudden market shift. Thus, the price of tin dropped precipitously after the collapse of the Malaysian buying effort in 1981-1982, and by March 1986, it dropped to about half the price before the 1985 collapse. The ultimate effect of these support efforts has been to produce wide swings between high and low prices.

A more realistic objective for the future is one stated in Article 1 of the Sixth ITA: "[t]o prevent excessive fluctuations in the price of tin and in export earnings from tin."³⁹ This goal, to smooth the path of market transitions, is modest but valuable, for it would contribute to a stable market, which would facilitate future planning by producers and consumers.

The current mechanism of setting an arbitrary price range by ITC vote has been insensitive to long-term market trends. Whether out of domestic political pressure or misplaced hope, governments of producers and consumers alike have been too quick to favor a price range in their short-term self-interest. A better method would be to provide for a range that adjusts automatically to reflect the market price over a recent period, perhaps taking as its middle the average market price during the past 3 months. A new range could be set automatically once each month. Thus, the range would follow the market, but it would shift slowly enough to smooth out major fluctuations. Provision could also be made for the exercise of emergency control, allowing the ITC to override the automatically set range with the approval of a two-thirds distributed majority. Final authority would still rest with the ITC, but short-term self-interest could not play such a major role.

Export Controls: The Problems of Free Riders and Smugglers

Export controls were in effect during the entire 1982-1985 support period, and at the time of the collapse, producers were allowed to export at only 60 percent of their previous level.⁴⁰ The controls were largely ineffective. Rather than reducing the level of world output, they only reduced the exports of producer members and, in combination with a high support price, encouraged production by nonmembers. Smuggling also helped to undermine the controls.

In 1981 ITA producer countries accounted for 71 percent of world output. By 1985, with export controls in place, their share had dropped to 57

³⁹ Sixth International Tin Agreement, *supra* note 29, Art. 1(b).

⁴⁰ Muhamad, *supra* note 30, at 63.

percent and was expected to continue dropping. Bolivia, which accounted for 16 percent of world production in 1980 and which had previously been an ITA member, continued its production unhindered. Production in other countries rose markedly. Britain and Canada, both consumer members, raised production. Nonmembers, however, took the greatest advantage of the favorable market supported by the ITC. The Chinese export level was expected to climb from 3,300 tons in 1983 to 6,000 tons in 1985. Peru increased from 700 tons per year to 3,000 tons. Brazil's production jumped from 9,300 tons in 1982 to 19,000 tons in 1984, which made it the world's fifth largest producer. The increased production by nonmembers undermined the efforts by producer members to reduce world production in order to bring it in line with consumption. Despite repeated requests by members, these nonmember producers have refused to join the ITA.⁴¹

The nonmember producers have stated various reasons for not wishing to join. China at one time based its refusal on ideological opposition to commodity agreements in which the developed capitalist countries took part, although China's recent moves in the direction of a market economy presumably weaken the ideological argument.⁴² The executive secretary of the Brazilian national organization for tin extraction argued: "You cannot subject new producers like Brazil to rules that old, experienced producers at the association follow. It would not allow us the conditions to survive."⁴³ Bolivia, while deciding whether to join the Fifth Agreement, expressed reservations about the structure and decision-making apparatus of the ITA, but concern about export controls may also have been a consideration.⁴⁴

On the basis of these countries' continued or increased production, it appears that at least one reason they have not joined the ITA is that they prefer to avoid export controls. China, which is just starting to exploit its large reserves, understandably hesitates to join an organization that might control Chinese exports on the basis of present levels.⁴⁵ Brazil, a low-cost producer with rapidly expanding exports, clearly wishes to avoid controls.⁴⁶ Bolivia, a high-cost producer, nevertheless has special motives to avoid restricting production. Tin exports provide it with an important source of foreign exchange, which may be more important than the degree of profitability. In addition, the Indian tin miners of the *altiplano* are a politically powerful and potentially revolutionary force. It is important to maintain production levels to keep them satisfied.⁴⁷

⁴¹ *Tin Mines Tragedy*, *supra* note 38, at 389; *China Urged to Curtail Exports*, *Am. Metal Market*, Sept. 18, 1985, at 4, col. 3; Robb, *Brazil Wary of Joining World Groups*, *Am. Metal Market*, July 26, 1985, at 11, col. 1 (special issue on tin); *Tin: Cookson in Brazilian Marketing Deal . . .*, 306 *MINING J.* 352 (May 16, 1986); *Tin without Emotion*, *supra* note 2, at 334.

⁴² W. BALDWIN, *supra* note 9, at 97.

⁴³ Robb, *supra* note 41 (quoting José Maria Gonçalves de Lima, executive secretary of the Sindicato Nacional da Indústria da Extração do Estanho). Presumably the "rules" that are not appropriate for Brazil are the export controls.

⁴⁴ See W. BALDWIN, *supra* note 9, at 97.

⁴⁵ See *Hard Times for Tin Mines*, *supra* note 36.

⁴⁶ See Robb, *supra* note 41.

⁴⁷ W. BALDWIN, *supra* note 9, at 97.

ITA members would like to strengthen the association by inducing the "free riders" to join. A good way to encourage them would be to eliminate export controls entirely. The controls are ineffective anyway without the participation of these important producers. Scrapping them might bring these countries into the ITA to take part in buffer stock management and other operations.

Export controls have been difficult to enforce even among the member states because of the constant problem of smuggling. It is most widespread in the Southeast Asian countries, where small operators who are hard to monitor account for a substantial amount of production. Most of the illicit traffic is by boat, and it is particularly difficult to control because small amounts may be concealed in any number of ways: "Tin has been hidden in fishing boats, in car batteries and spare tires, in hollow tubes of bicycle frames. It has been tucked beneath stretchers on ambulances and inside plaster casts on unbroken legs. Once it was packed into concrete pillars consigned from Malaysia to a Singapore construction project."⁴⁸ Singapore, which does not question the source of imported tin, has been the major destination of the smugglers. In 1983, 16,550 tons of tin, nearly 10 percent of world consumption, were smuggled into Singapore. Antismuggling measures, including increased naval patrols by producer countries, cut the level in 1984 to 11,400 tons, an improvement, but still a large quantity.⁴⁹

Private producers turn to smuggling to evade export controls. An additional effect of smuggling is that it prevents the country of production from collecting taxes and royalties. The elimination of export controls, by reducing the incentive to smuggle, would lead to an increase in these governmental revenues.

The abandonment of export controls by the ITA would therefore give rise to several beneficial effects. Nonmembers would become more likely to join. Members would be free to maintain production (and tin industry employment) at the optimal domestic level. Smuggling and the consequent loss of governmental revenue would be curtailed.

The Buffer Stock: Inadequate Size and Poor Management

Whether or not the system of export controls is scrapped, the buffer stock requires reform. First, it is too small. Convincing the current free riders and the United States to join and make contributions would help, but an even larger increase would be better. Second, management of the buffer stock

⁴⁸ Tamarkin, *Smuggling Threatens Ailing World Tin Industry*, Wall St. J., July 30, 1984, at 20, col. 1.

⁴⁹ *Thailand's Tin Troubles*, 305 MINING J. 301 (Oct. 18, 1985); *Tin without Emotion*, *supra* note 2; *Efforts to Curb Tin Smuggling Helped Stabilize World Market*, Am. Metal Market, May 15, 1984, at 8, col. 2. Much of the tin smuggled into Singapore is smelted at the one private refinery, operated by Kimetal Private Ltd., which reported 1983 sales of \$158 million. Malaysia tried to pressure Singapore into closing the smelter, but Singapore refused. Tamarkin, *supra* note 48.

must be more closely circumscribed. The manager had too much discretion to engage in imprudent transactions in the period leading up to the 1985 collapse.

The Sixth ITA calls for a buffer stock equivalent to 30,000 tons of tin from member contributions (split evenly between producers and consumers) and 20,000 tons to be financed from borrowing.⁵⁰ Actual contributions have only totaled 19,666 tons, however, because the Agreement has only come into force provisionally.⁵¹ In contrast, the United States favored a buffer stock of 70,000 tons in the negotiations leading to the Sixth ITA.⁵² The creation of a large buffer stock assumes particular importance after the 1985 collapse because it would reestablish confidence in the ITC.

In the period leading up to the collapse, the limited size of the buffer stock led its manager, Pieter de Koning, to resort to methods of questionable propriety so as to defend the floor price. The LME briefly suspended tin trading in June 1985, for example, when de Koning was largely responsible for a squeeze on metal supplies for prompt delivery. In a period of general surplus, it seems inappropriate for the buffer stock manager to use disruptive tactics to force a temporary price jump. Apparently, he wished to demonstrate his control of the market by punishing traders who had earlier sold short.⁵³ With insufficient funds at his disposal, de Koning perhaps felt that forceful tactics were necessary to discourage traders from taking positions that threatened his defense of the floor. Such tactics, however, seem inconsistent with the stated objective of the ITA, to "prevent excessive fluctuations in the price of tin."⁵⁴

De Koning's efforts to stretch the buying power of his limited funds eventually led to the collapse and default. When he had exhausted the formal borrowing routes authorized by the ITC, he supported the market in two ways. First, he "borrowed" money from LME brokers by selling tin on a cash basis and repurchasing the same quantity in 3-month futures contracts.⁵⁵

⁵⁰ Sixth International Tin Agreement, *supra* note 29, Art. 21. Contributions must be in cash, equivalent to the value of the apportioned tonnage.

⁵¹ *Tin Mines Tragedy*, *supra* note 38, at 390. ⁵² *Tin: Swapping Cartels*, *supra* note 27.

⁵³ A number of traders had sold tin short in the belief that lower prices were imminent, selling futures contracts primarily to the buffer stock manager. Tin prices did not fall, however, and, as delivery dates approached, the buffer stock manager was virtually the only source of physical metal (although tin was in a long-term period of oversupply). As the squeeze became acute, and de Koning offered to sell only at a very high price, the backwardation (the premium for delivery on one day rather than the next) rose to £800/ton. The LME suspended trading and imposed a backwardation limit of £90/ton. *Tin Market Confusion*, 305 MINING J. 1 (July 5, 1985).

On de Koning himself, see Edwards, *Man in the News: Test of Mettle for the Tin Man*, *Fin. Times*, Oct. 26, 1985, at 6, col. 1. De Koning, a Dutchman, was selected for the post as a compromise between producers and consumers. Although the Netherlands is a consumer country, it is traditionally sympathetic to concerns of developing countries and has strong ties with Indonesia, a major producer.

⁵⁴ Sixth International Tin Agreement, *supra* note 29, Art. 1.

⁵⁵ *Tin Mines Tragedy*, *supra* note 38, at 390-91.

This form of borrowing is not specifically authorized or prohibited by the Sixth ITA.⁵⁶

More importantly, de Koning purchased tin in 3-month contracts and arranged to sell the same quantity to industrial consumers, also on a 3-month basis. Following the practice of the trade, however, he purchased contracts at a fixed price but agreed with the industrial consumer that the price to be paid would be determined on the date of delivery by reference, for example, to the market price on that date or an average over a period. This system worked for the buffer stock manager as long as the tin price remained stable, but it led to large losses when the price declined.⁵⁷ This practice also is not specifically authorized or prohibited by the Sixth ITA.

These problems would not have arisen if the buffer stock manager were restricted to dealing on a cash basis, or at least had clear restraints that limited exposure. It also appears that the extent of the manager's activities was not always known, either to the ITC or to the public.⁵⁸ The buffer stock manager should certainly be required to make detailed and regular reports to the ITC.

The buffer stock should be enlarged and tight controls placed on its management. These steps would increase the ITC's strength and influence in the market. Larger size would make exhaustion of its resources less likely. Tighter controls that limit exposure would make running out of funds less painful. If losses are limited, the exhaustion of resources will result merely in suspending the buffer stock manager's market activities rather than in bringing down the entire market.

VI. CONCLUSION

The ITA has been crippled by the 1985 collapse. Its market support funds have been exhausted and then some. Its future credibility is seriously in question. The ITA, however, is worth saving. In the past, it has been successful in moderating the volatile price of tin. If it is to survive as an effective force, the ITA must make major reforms to eliminate the possibility that the 1985 collapse will recur. The reforms must be aimed at retaining current membership, inducing free riders to join and reestablishing confidence in the organization among other market participants. This paper has suggested basic improvements to accomplish these goals.

⁵⁶ In fact, the Sixth ITA does not specifically permit the buffer stock manager to trade in futures contracts of any kind. Failure to address such important questions is a major weakness. The Agreement should spell out the manager's duties in greater detail. The International Natural Rubber Agreement furnishes a good comparison. It provides that its buffer stock manager may trade in futures contracts of certain specified types, and it requires complete and detailed monthly reports on all buffer stock transactions. International Natural Rubber Agreement, 1979, UN Doc. TD/RUBBER/15, Art. 31 (1979), reprinted in C. JOHNSTON, *supra* note 1, Binder 2, App. IV.10.01.

⁵⁷ *Tin Mines Tragedy*, *supra* note 38, at 390-91.

⁵⁸ *Id.*

First, the mechanism of setting the official price range should be reexamined with a view to preventing long-term conflict with major market trends. This could be done by providing an automatic adjustment of the range by a formula that would react to recent market prices. Authority could be retained to override the automatic setting by a supermajority.

Second, export controls should be eliminated. Their effects have been detrimental. They encourage free riders to remain outside the ITA and to increase production at the expense of members. Controls may also lead to unemployment in producer countries. Furthermore, they have been largely circumvented by smuggling, with a resultant loss of tax and royalty revenues for producer countries.

Last, the buffer stock should be enlarged, and strict controls should ensure that its manager does not engage in transactions with inappropriate exposure. The buffer stock manager should be required to make detailed and regular reports to the ITC.

The ITC has failed in its attempt to control the long-term market price of tin. In the 1970s, consumers, led by the United States, were able temporarily to keep the official price artificially low, in hopes of preventing price rises. From 1982 to 1985, producers temporarily maintained an artificially high price. Both groups were unsuccessful. The ITC can still perform an important function if it limits its market management to smoothing out relatively short-term fluctuations. With smooth transitions, long-term trends can more easily be gauged, and producers and consumers would both benefit from the improved possibility of long-range governmental and private planning. Total consumption of tin may increase if industrial users find that they can count on an adequate supply from a stable market. All parties have a common interest in a restructured ITA that can ensure stability.

The basic problems encountered by tin are not unique to it. An artificial price in conflict with market trends is difficult to maintain indefinitely, as OPEC recently discovered. This is true for any commodity subject to substitution, conservation, recycling or higher production, all of which tend to be encouraged by a high price. Even when short-term demand is inelastic, as for tin, an artificial price may be untenable in the long term. A high support price and export controls will encourage production by free riders in any commodity with a substantial number of disparate producers. Export controls are always difficult to enforce, all the more when a commodity is in a large number of private hands. A buffer stock must be large and properly managed to be most effective in minimizing market fluctuations. The experience of the ITA should encourage other commodity pacts to examine their operations *before* a crisis arises.

TWO WAYS OF THINKING ABOUT CULTURAL PROPERTY

By John Henry Merryman*

One way of thinking about cultural property—i.e., objects of artistic, archaeological, ethnological or historical interest¹—is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction. That is the attitude

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¹ Any comprehensive definition of cultural property would have to include such objects and much more. Thus, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, *infra* note 6, defines cultural property in Article 1 to include:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
- (b) property relating to history, including the history of science and technology and military and social history . . . ;
- (c) products of archaeological excavations . . . ;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest . . . ;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest . . . ;
- (i) postage, revenue and similar stamps . . . ;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

In some nations, cultural objects and environmental treasures (including natural and artificial landscapes and ecological areas, plus, in cities, urban structures and panoramas) are treated as fundamentally related to each other. See T. ALIBRANDI & P. FERRI, *I BENI CULTURALI E AMBIENTALI* (1985). Cf. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, UNESCO Doc. 17/C/106 (1972). For a discussion of folklore as cultural property, see Glassie, *Archaeology and Folklore: Common Anxieties, Common Hopes*, in *HISTORICAL ARCHAEOLOGY AND THE IMPORTANCE OF MATERIAL THINGS* 23 (L. Ferguson ed. 1977).

The entire question of the proper definition of cultural property for legal and policy purposes is a large and unruly one that fortunately need not be pursued here. Works of art and archaeological and ethnological objects surely qualify under any definition; museums acquire and display them, scholars study them, collectors collect them and dealers sell them. National laws and international conventions provide for their preservation and regulate trade in them. A strong international consensus supports their inclusion in any definition of cultural property.

embodied in the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (hereinafter "Hague 1954"),² which culminates a development in the international law of war that began in the mid-19th century.

Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the "repatriation" of cultural property. As a corollary of this way of thinking, the world divides itself into source nations and market nations.³ In source nations, the supply of desirable cultural property exceeds the internal demand. Nations like Mexico, Egypt, Greece and India are obvious examples. They are rich in cultural artifacts beyond any conceivable local use. In market nations, the demand exceeds the supply. France, Germany, Japan, the Scandinavian nations, Switzerland and the United States are examples.⁴ Demand in the market nation encourages export from source nations. When, as is often (but not always) the case, the source nation is relatively poor and the market nation wealthy, an unrestricted market will encourage the net export of cultural property.

Despite their enthusiasm for other kinds of export trade, most source nations vigorously oppose the export of cultural objects.⁵ Almost every national government (the United States and Switzerland are the principal exceptions) treats cultural objects within its jurisdiction as parts of a "national cultural heritage." National laws prohibit or limit export, and international agreements support these national restraints on trade. This way of thinking about cultural property is embodied in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970 (hereinafter "UNESCO

² 249 UNTS 240. The conference that produced Hague 1954 was called by UNESCO, so it is right to think of the Convention as to some extent a UNESCO product. The differences between Hague 1954 and UNESCO 1970 that are described in this article flow to some extent from the different subject matters of the two Conventions, but they also reflect the changes that have taken place in UNESCO's membership, structure, program and ideology since 1954.

³ L. PROTT & P. O'KEEFE, NATIONAL LEGAL CONTROL OF ILLICIT TRAFFIC IN CULTURAL PROPERTY 2 (UNESCO 1983), include a third category of "transit countries" which, though useful for other purposes, is not relevant here.

⁴ The reader will not need to be reminded that a nation can be both a source of and a market for cultural property. For example, there is a strong market abroad for works of North American Indian cultures, even though Canada and the United States are thought of primarily as market nations. Conversely, there are wealthy collectors of foreign as well as national cultural objects in most source nations.

⁵ The question why nations prohibit the export of cultural property is an unexpectedly complex and interesting one that I will treat in another article. On the surface, it seems that there are several levels of motivation: romantic Byronism (see Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1880, 1903-05 (1985)); the notion of "national cultural patrimony" and related political/symbolic uses of cultural property; lack of the cultural expertise and organization to deal with cultural property as a resource, like other resources, to be managed and exploited; entrenched interests that illegally, but profitably, exploit cultural property and favor perpetuation of the status quo; and so on.

1970"),⁶ which is the keystone of a network of national and international attempts to deal with the "illicit" international traffic in smuggled and/or stolen cultural objects.

While both Conventions purport to protect cultural property, they give the term "protection" different meanings and embody different and somewhat dissonant sets of values. In part, the divergence flows naturally from the diverse subject matters of the two Conventions, one dealing with protection of cultural property from the acts of belligerents in time of war, the other with international traffic in cultural objects. But the differences in outlook that are of interest here are fundamental, transcending such distinctions. I describe these differences and explore their implications for the national and international policy and law of cultural property.

HAGUE 1954 AND CULTURAL INTERNATIONALISM

Hague 1954 is a direct descendant of the work of Francis Lieber, "the man who shaped and laid the cornerstone on which the laws of war, as we now find them, are based."⁷ Lieber, a German émigré professor at Columbia College in New York, had assisted Henry Wager Halleck, General-in-Chief of the Union Armies, in defining guerrilla warfare. At Halleck's request, Lieber prepared a proposed "code of conduct by belligerent forces in war" to apply to the conduct of the Union forces in the American Civil War. Issued by the Union command as General Orders No. 100 on April 24, 1863, the Instructions for the Governance of Armies of the United States in the Field or Lieber Code contains 157 articles. Articles 34–36 deal with protection of cultural property and provide:

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories; museums of the fine arts, or of a scientific character—such property is not to be considered public property . . . but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precise instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

⁶ 823 UNTS 231, reprinted in 10 ILM 289 (1971).

⁷ Taylor, *Foreword*, in *THE LAW OF WAR: A DOCUMENTARY HISTORY*, at xv (L. Friedman ed. 1972) [hereinafter cited as Friedman]; cf. R. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (1983).

Lieber, of course, was not the first to argue for protection of cultural property from damage or seizure by belligerents. Polybius of Athens, a Greek historian of the 3d–2d century B.C., is frequently quoted as the earliest such advocate. See De Visscher, *La Protection internationale des objets d'art et des monuments historiques (2me partie)*, 16 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE* (3d ser.) 246, 247 (1935), translated and republished as De Visscher, *International Protection of Works of Art and Historic Monuments*, 1 U.S. DEP'T OF STATE, DOCUMENTS AND STATE PAPERS 821, 823 (1949) (quoting Polybius).

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.⁸

The Lieber Code was the first attempt to state a comprehensive body of principles governing the conduct of belligerents in enemy territory. Its influence can be traced through a number of succeeding efforts. Thus, at an international conference of 15 states called by the Russian Government and held in Brussels in 1874, the "Declaration of Brussels" was promulgated (but never adopted as an international convention because of the resistance of Great Britain). Article 8, of a total of 56 articles, states:

The property of parishes (communes), or establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. Every seizure, destruction of, or wilful damage to, such establishments, historical monuments, or works of art or science, shall be prosecuted by the competent authorities.⁹

In 1880 the prestigious Institute of International Law (an organization of scholars of international law) included a similar provision (Article 56) in its "Manual of the Laws and Customs of War."¹⁰ In 1899, again at the initiative of the Russian Government, a conference of 26 nations was convened at The Hague. This important conference produced a number of international agreements, including the Convention with Respect to the Laws and Customs of War on Land (Hague II, 1899) and a set of Regulations Respecting the Laws and Customs of War on Land in 60 articles, of which Article 56 deals with the protection of cultural property in similar terms.¹¹

Such provisions appear with increasing frequency in the present century. In 1907, at the initiative of the United States (President Theodore Roosevelt) and, again, of Russia, another important conference was convened at The Hague, attended by 44 nations. The Convention on Laws and Customs of War on Land (Hague IV, 1907) adopted at that conference has a set of appended Regulations Respecting the Laws and Customs of War on Land, of which Article 56 provides in similar terms for the protection of cultural property.¹² The same 1907 conference produced the Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), which pro-

⁸ Friedman, *supra* note 7, at 165; R. HARTIGAN, *supra* note 7, at 51-52.

⁹ Friedman, *supra* note 7, at 195.

¹⁰ RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 36-37 (J. B. Scott ed. 1916).

¹¹ For the Convention, July 29, 1899, see 32 Stat. 1803, TS No. 403, *reprinted in* Friedman, *supra* note 7, at 234.

¹² For the Convention, Oct. 18, 1907, see 36 Stat. 2277, TS No. 539, *reprinted in* Friedman, *supra* note 7, at 323.

vides in Article 5 for the protection of "historic monuments," "art" and "science."¹³ In 1923 another Hague conference produced the Hague Rules of Air Warfare (which were never adopted by the powers concerned). Articles 25 and 26 provide for the protection of cultural property.¹⁴

Hague IV, 1907, and related conventions were the governing general international legislation on the conduct of belligerents until the end of World War II. On the whole, these conventions merely restated earlier provisions concerning cultural property. Although the language varied from one to another, the basic structure of protection remained the same: subject to an overriding concession to military necessity, which will be discussed below, cultural objects were protected. Individuals responsible for offenses against cultural property were to be punished by the authorities of their own nations.

The Lieber Code and its progeny all dealt comprehensively with the obligations of belligerents; the protection of cultural property was merely one among many topics. In the 1930s, however, international interest turned to the preparation of a convention dealing solely with the protection of cultural property in time of war. In 1935 the 21 American nations promulgated a Treaty on the Protection of Artistic and Scientific Institutions and Monuments, now generally referred to as the Roerich Pact.¹⁵ As the first international convention entirely devoted to the protection of cultural property, this document is historically important, but it is now, for all practical purposes, superseded. In 1939 the Governments of Belgium, Spain, the United States, Greece and the Netherlands, under the auspices of the League of Nations, issued a Draft Declaration and a Draft International Convention for the Protection of Monuments and Works of Art in Time of War.¹⁶ Like the Roerich Pact, these League efforts were quickly overtaken by the events of World War II, by changes in the technology, tactics and strategy of warfare and the new concept of "total war," and by the offenses against cultural property deliberately and systematically committed by the Nazis. By the end of World War II, the governing rules concerning protection of cultural property against belligerent acts had clearly become inadequate. Two major legal events then occurred: the Nuremberg Trials and the promulgation, under the auspices of the United Nations Educational, Scientific and Cultural Organization, of Hague 1954.

Alfred Rosenberg, one of the principal accused Nazis at the Nuremberg Trials, was among other things head of the infamous Einsatzstab (Special Staff) Rosenberg. The Einsatzstab was charged with looting German-occupied countries of cultural property, an assignment that it ruthlessly, vora-

¹³ Oct. 18, 1907, 36 Stat. 2351, TS No. 542.

¹⁴ Friedman, *supra* note 7, at 441.

¹⁵ Apr. 15, 1935, 49 Stat. 3267, TS No. 899, 167 LNTS 279. Roerich was a Russian painter, poet and activist on behalf of cultural preservation who also lived in Finland, Britain, the United States and India, where he died in 1947. His draft of a proposed convention and his design for a banner—"the Banner of Peace" (reproduced with the Treaty in TS No. 899)—were in large part adopted by the parties to the convention. See E. ALEXANDROV, *THE ROERICH PACT AND THE INTERNATIONAL PROTECTION OF CULTURAL INSTITUTIONS AND TREASURES* (Sofia 1978).

¹⁶ 1 U.S. DEP'T OF STATE, DOCUMENTS AND STATE PAPERS 859 (1949).

ciously and efficiently executed. Rosenberg's indictment and the evidence introduced at his trial detailed his (and the Einsatzstab's) offenses against cultural property.¹⁷ Rosenberg was found guilty of these (and many other) offenses and was hanged. The innovation here, as elsewhere in the Nuremberg Trials, was that other nations imposed responsibility on an individual official of the offending belligerent power for acts against cultural property committed in its name. The Lieber Code and its progeny had a different basis: such offenses violated international law, but offending personnel were to be disciplined, if at all, by their own governments.¹⁸

Hague 1954, the first universal convention to deal solely with the protection of cultural property, appears to incorporate the principle of individual international responsibility, affirmed at Nuremberg, in Article 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, *of whatever nationality*, who commit or order to be committed a breach of the present Convention" (emphasis added). This language seems to authorize, indeed to oblige, nations that acquire personal jurisdiction of persons accused of Hague 1954 violations to try them.

A more significant novelty of Hague 1954, however, is that it provides a rationale for the international protection of cultural property. The language of the Preamble is for this reason alone memorable:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

¹⁷ See materials collected in J. MERRYMAN & A. ELSER, *LAW, ETHICS AND THE VISUAL ARTS* 1-43 ff. (1979-); S. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY* 23-29 (1978).

¹⁸ In fact, the principle that individuals accused of (other kinds of) war crimes could be tried by the offended governments had been accepted long before. See R. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 17 ff. (1960). In addition, there was recent relevant evidence that trials of accused war criminals by their own national courts were ineffectual. The Treaty of Versailles provided in Article 228 that Germans accused of war crimes would be tried by military tribunals of the victorious Allies. In pursuance of this provision, a list of 896 alleged war criminals, including highly placed officers, was submitted by the Allies with the demand that they be turned over for trial.

The German cabinet strenuously objected to the demand, citing the opposition of the German public. The Germans reported to the Allies that there would be an insurrection if they tried to deliver the names on the list, and army leaders said they would resume the war if the Allies pressed the matter.

Friedman, *supra* note 7, at 777. It was eventually agreed that the Germans would conduct the trials in their own high court, the Reichsgericht in Leipzig, applying international law. The Allies provided a drastically reduced list of 45 names, and the Germans agreed to try 12 of them. Six were eventually tried and convicted; they received light sentences, ranging from a few months to 4 years in prison. (Those who were eventually imprisoned immediately "escaped.") For a contemporary account and evaluation of the trials, see C. MULLINS, *THE LEIPZIG TRIALS* (1921).

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection. . . .

While it seems clear that such considerations underlay the protection of cultural property in Lieber's code and its successors, their expression in Hague 1954 is a significant innovation. The quoted language, which has been echoed in later international instruments,¹⁹ is a charter for cultural internationalism, with profound implications for law and policy concerning the international trade in and repatriation of cultural property. The principle appears to apply, for example, to the Elgin marbles; they are a part of "the cultural heritage of all mankind." It follows that people who are not Greek or British have an interest in their preservation, integrity and availability for enjoyment and study.²⁰ The perennial debate about the propriety of their removal from Greece by Elgin and the current proposals to return them to Athens become the business of others besides Greeks and Britons. As the smog of Athens eats away the marble fabric of the Parthenon, all of mankind loses something irreplaceable. These matters are discussed below.²¹

Hague 1954 contains one significant concession to nationalism: like its predecessors, it limits the protection of cultural property by the doctrine of "military necessity." As stated in Articles 14 and 15 of the Lieber Code:

¹⁹ Such echoes can be found in the language of the UNESCO Recommendation Concerning the International Exchange of Cultural Property of Nov. 26, 1976, UNESCO Doc. IV.B.8, though usually combined with insistence on the centrality of national interests. Thus, the Preamble states: "Recalling that cultural property constitutes a basic element of civilization and national culture," and "Considering that a systematic policy of exchanges among cultural institutions . . . would . . . lead to a better use of the international community's cultural heritage which is the sum of all the national heritages" (emphasis supplied). Article 2 of the recommendation contains a less nationalistic statement: "Bearing in mind that all cultural property forms part of the common heritage of mankind. . . ."

²⁰ For a discussion of the marbles and of preservation, integrity and distribution/access as the three main categories of international interest in cultural property, see Merryman, *supra* note 5, at 1916-21.

²¹ Two colleagues have suggested that one can distinguish cultural objects of merely local, national or regional interest from those of truly international importance. Hague 1954 specifically rejects any such distinction, as the quoted provision from the Preamble makes clear, equating "cultural property belonging to any people whatsoever" with "the cultural heritage of all mankind" because "each people makes its contribution to the culture of the world." Still, it does not seem unreasonable to suppose that some objects really have little or no importance beyond local or national borders: the bronze effigy of an obscure politician executed by a mediocre artist of merely local reputation standing in a park in a provincial town in Brazil, as one example; the Liberty Bell, as another. Neither of these objects has intrinsic value, and the cultural importance of each seems to be entirely specific to the town in Brazil or to the United States, respectively. Would the rest of the world be culturally impoverished by the destruction of either? Arguably not, but there are two major difficulties: one is that the effort to distinguish objects of local from those of international significance enters a no-man's-land that is shrouded in uncertainty and strewn with land mines. The Liberty Bell, for example, is a symbol of the American Revolution, a great event in Western history. Does it really ring only for Americans? The other problem is that what seems of local and minor interest now may unexpectedly assume major international importance. The minor politician may be reevaluated by scholarship, or the artist may have gone on to greater things, leaving only this bronze as an example of an important formative stage in his career.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.

15. Military necessity . . . allows of all destruction of property.

²²

Hague 1954 is not greatly different. Article 4(2) provides that the obligation to respect cultural property "may be waived . . . in cases where military necessity imperatively requires such a waiver." In short, military necessity can justify the destruction of cultural property otherwise protected by the Convention.

This principle, whose origin has been attributed to Prussian militarism—"la célèbre conception prussienne de la Kriegsraison"²³—was strongly debated at the conference that produced Hague 1954 and was retained by a divided vote.²⁴ The criticisms are of several kinds. One is that the concept of military necessity is so indefinite and the circumstances of its use in the field so fluid that "necessity" too quickly and easily shades into "convenience." The problem was anticipated by General Eisenhower in a statement to the Allied forces on December 29, 1943: "[T]he phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference."²⁵ Military necessity was one of the standard defenses used by accused war criminals after World Wars I and II.²⁶

A related but more subtle difficulty is that, in practice, field commanders can be expected to place other values higher than cultural preservation and to translate them into "military necessity." The conduct of the Allied forces in Europe in 1943–1945 provides various examples. General Eisenhower issued clear directions for the preservation of cultural property on December

²² Friedman, *supra* note 7, at 161; R. HARTIGAN, *supra* note 7, at 48.

²³ Nahlik, *La Protection internationale des biens culturels en cas de conflit armé*, 120 RECUEIL DES COURS 61, 87 (1967 I).

²⁴ Nahlik, *id.* at 128 *ff.*, describes the debates and states that the United States, Great Britain and Turkey insisted on including an exception for military necessity, while the USSR, Romania, Greece, Belgium, Ecuador and Spain were among those that argued that such an exception was "incompatible avec l'esprit et les principes essentiels de la Convention." It is ironic that the United States, which insisted on the military necessity exception and, with Great Britain, argued that without it "plusieurs pays ne se trouveraient plus en mesure de signer et de ratifier la Convention," has not itself ratified Hague 1954. It is also significant that the earlier Roerich Pact, *supra* note 15, to which the United States was a party, contained no military necessity clause. The decisive vote on the Soviet motion to delete the military necessity clause was 20 opposed, 7 in favor and 14 abstentions. *Id.* at 131.

²⁵ AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, REPORT 48 (1946) [hereinafter cited as REPORT]. The *Report* describes the work of the Commission, created in 1943, the field operations of the Monuments, Fine Arts, and Archives Section (MFA&A), and the treatment of cultural property during and after hostilities in World War II.

²⁶ Dunbar, *Military Necessity in War Crimes Trials*, 29 BRIT. Y.B. INT'L L. 442 (1952).

29, 1943 in Italy,²⁷ and on May 26, 1944, as the Allies began to sweep across northern Europe.²⁸

General Eisenhower's reference to the Abbey of Monte Cassino, one of the oldest and most revered and honored sites in Europe, is unfortunate and revealing. The Allies destroyed Monte Cassino, but there was no military necessity of doing so. As the *Report* of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas states:

Although the German High Command had apparently issued orders that troops were not to enter the monastery under any circumstances, there were enemy observation posts and mortar and other defensive positions all over the mountain around the abbey, and to the Allied armies the towering walls crowning the mountain may well have grown into a symbol of the opposition against a victorious advance. In any case these defensive positions and the abbey were blasted by artillery and aerial bombardments and the abbey was very largely destroyed in attacks on February 5, 8, and 11, culminating in the aerial assault of February 15.

Of the seventeenth-century church almost nothing remained. The monastic buildings, library, picture gallery, and all structures were reduced to rubble.²⁹

27

Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments as far as war allows.

If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more and the buildings must go. But the choice is not always so clear-cut as that. In many cases the monuments can be spared without any detriment to operational needs. Nothing can stand against the argument of military necessity. That is an accepted principle. But the phrase "military necessity" is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want it to cloak slackness or indifference.

REPORT, *supra* note 25, at 48.

28

Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve.

It is the responsibility of every commander to protect and respect these symbols whenever possible.

In some circumstances the success of the military operation may be prejudiced in our reluctance to destroy these revered objects. Then, as at Cassino, where the enemy relied on our emotional attachments to shield his defense, the lives of our men are paramount. So, where military necessity dictates, commanders may order the required action even though it involves destruction to some honored site.

But there are many circumstances in which damage and destruction are not necessary and cannot be justified. In such cases, through the exercise of restraint and discipline, commanders will preserve centers and objects of historical and cultural significance.

Id. at 102.

²⁹ *Id.* at 67.

The choice between saving human lives and saving irreplaceable monuments is not an easy one. To use a classroom example, suppose you command a company of soldiers in the vicinity of the cathedral of Chartres. An enemy artillery spotter in one of the towers is directing fire against you and your men and must be removed. You can bomb the cathedral without endangering your men or you can order some of them to enter the cathedral and find and remove the spotter. One or more of the men would in that case probably be killed. Do you bomb the cathedral? Is this a case of "military necessity"? Students try to evade the issue, but when forced to choose, they generally state that human lives are more important. Only a minority agree with Sir Harold Nicolson:

I am not among those who feel that religious sites are, as such, of more importance than human lives . . .; nor should I hesitate, were I a military commander, to reduce some purely historical building to rubble if I felt that by doing so I could gain a tactical advantage or diminish the danger to which my men were exposed. Works of major artistic value fall, however, into a completely different category. It is to my mind absolutely desirable that such works should be preserved from destruction, even if their preservation entails the sacrifice of human lives. I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; nor should I hesitate for an instant (were such a decision ever open to me) to save St. Mark's even if I were aware that by so doing I should bring death to my sons. . . . My attitude would be governed by a principle which is surely incontrovertible. The irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again.³⁰

The Monte Cassino example and many others described in the *Report* illustrate both the complexity of the field commander's decision and the depressing regularity with which "honored objects" and "revered sites" were destroyed as the Allied armies advanced and the Allied air forces bombed. We did enormous damage to irreplaceable works. A military necessity equation that routinely values the possibility of loss of life higher than the certainty of destruction of cultural property necessarily produces that kind of result. Where the cultural property in question belongs to the enemy, the equation tilts further against preservation. In World War II, "military necessity" justified saturation bombing of towns containing irreplaceable cultural treasures and "precision" bombing of factories and yards adjacent to great monuments of human achievement, guaranteeing widespread damage and destruction.³¹

A third objection is more fundamental, arguing that military necessity is a relic of an age that treated aggressive war as a legitimate instrument of

³⁰ Sir Harold Nicolson, *Marginal Comments*, SPECTATOR, Feb. 25, 1944, reprinted in full in J. MERRYMAN & A. ELSER, *supra* note 17, at 1-85 ff.

³¹ Not to mention enormous loss of noncombatant lives. See D. IRVING, *THE DESTRUCTION OF DRESDEN* (1963); cf. K. VONNEGUT, *SLAUGHTERHOUSE-FIVE; OR THE CHILDREN'S CRUSADE* (1969).

national policy—an age evoked by such terms as *jus ad bellum*, *Kriegsraison*, *Kriegsbrauch*, *raison de guerre*, *raison d'état*, and so on. Why, such critics ask, should a great cultural monument be legally sacrificed to the ends of war? What does it say about our scale of values when we place military objectives above the preservation of irreplaceable cultural monuments?³² This criticism obviously gains force from the present century's outlawing of aggressive war³³ and from acceptance of the idea that cultural property belongs to all mankind, not merely to the nation of its situs or to the belligerents.³⁴

Finally, the concession to military necessity seems inconsistent with the premises of Hague 1954: "the cultural heritage of all mankind" is put at the mercy of the relatively parochial interests of certain belligerents. In an international convention to which national states are parties, this is perhaps unsurprising and may be unavoidable. Still, the matter was vigorously discussed and the concession to nationalism strongly opposed by major nations at the conference.

Despite its deference to military necessity, Hague 1954 expresses several important propositions affecting the international law of cultural property. One is the cosmopolitan notion of a general interest in cultural property ("the cultural heritage of all mankind"), apart from any national interest.³⁵ A second is that cultural property has special importance, justifying special legal measures to ensure its preservation. Another is the notion of individual

³² See the discussion of the debate in Nahlik, *supra* note 23, at 128 ff.; and compare the views of G. BEST, *HUMANITY IN WARFARE passim* (1980), with those of J. BAKER & H. CROCKER, *THE LAWS OF LAND WARFARE CONCERNING THE RIGHTS AND DUTIES OF BELLIGERENTS* 149 ff., 209–13 (1919).

³³ Beginning with the Kellogg-Briand Pact of Aug. 27, 1923, 46 Stat. 2343, TS No. 796, 94 LNTS 57, and followed by the United Nations Charter, Article 2, paragraph 4, the illegality of aggressive war has been generally accepted among nations. One of the charges against the major war criminals at Nuremberg was that they initiated and waged wars of aggression. Charter of the International Military Tribunal, Art. 6, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, U.S. DEP'T OF STATE PUB. NO. 380, 2 INTERNATIONAL ORGANIZATION AND CONFERENCE SERIES, 1 EUROPEAN AND BRITISH COMMONWEALTH 423 (1949).

³⁴ Still, if military necessity can justify the denial or limitation of the constitutionally guaranteed rights of individuals, as it sometimes does in American constitutional law (Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3 (1980)), perhaps it is not surprising that we permit it to justify the destruction of cultural treasures.

³⁵ There is growing international acceptance of a similar interest of "all mankind" in the physical environment, in space and in the seabed. Cf. UN Convention on the Law of the Sea, opened for signature Dec. 10, 1982, reprinted in UNITED NATIONS, *THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* (UN Pub. Sales No. E.83.V.5), which provides in the Preamble that "the area of the sea-bed and the ocean floor and the subsoil thereof . . . as well as its resources, are the common heritage of mankind," and in Article 136 that the "Area and its resources are the common heritage of mankind." Disagreement with the implications of this concept for access to and management of deep sea resources was a principal reason for the U.S. refusal, among others, to accede to the LOS Convention. M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 281–82 (5th ed. 1984). For a discussion of the proposed application of the "common heritage" concept to Antarctica (also opposed by the United States), see D. SHAPLEY, *THE SEVENTH CONTINENT: ANTARCTICA IN A RESOURCE AGE* 160 (1985).

responsibility for offenses against cultural property. The fourth is the principle that jurisdiction to try offenses against cultural property is not limited to the government of the offender.³⁶ The first and second of these propositions are expressed in a variety of other international acts and agreements (including UNESCO 1970 and its cluster of related events and documents, which will be discussed below). One can therefore treat them as principles of general applicability, not limited to controlling the conduct of belligerents in time of war or civil conflict.

The third and fourth propositions, however, growing out of the Lieber Code, the Hague 1899 and 1907 Conventions, the experiences of World Wars I and II and the Nuremberg Trials, are more closely tied to the international law of war. For example, they do not at present apply to the peacetime traffic in smuggled or stolen cultural property. Like all major international conventions, however, Hague 1954 exerts an influence that extends beyond the obligations imposed on and accepted by its parties. It is a piece of international legislation that exemplifies an influential way of thinking about cultural property, which I will call "cultural internationalism."³⁷ We now examine another way, exemplified by UNESCO 1970.

UNESCO 1970 AND CULTURAL NATIONALISM

The forerunners of the UNESCO 1970 Convention include: Resolution XIV, Protection of Movable Monuments, of the Seventh International Conference of American States of 1933;³⁸ three draft international conventions prepared by the League of Nations in 1933, 1936 and 1939, the last of which was entitled Draft International Convention for the Protection of National Collections of Art and History;³⁹ and the UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property of 1964.⁴⁰

³⁶ Hague 1954 also provides that the ordinary courts—i.e., the courts that ordinarily try criminal offenses—should be used, rather than military tribunals or special tribunals created for the purpose. One reason for the Germans' resistance to the provision in the Treaty of Versailles that alleged German war criminals be tried by the Allies was that Allied military tribunals would try them.

³⁷ "Supranationalism," "meta-nationalism" or "cosmopolitanism" might, strictly speaking, be better than "internationalism," since the idea is that humanity, independently of nations and international arrangements, is the party in interest. Use of "internationalism" in this sense, however, has become common enough and will do.

³⁸ REPORT OF THE DELEGATES OF THE UNITED STATES OF AMERICA TO THE SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, MONTEVIDEO, URUGUAY, DECEMBER 3–26, 1933, U.S. DEP'T OF STATE CONFERENCE SERIES NO. 19, at 208 (1934).

³⁹ All three are set out in 1 U.S. DEP'T OF STATE, DOCUMENTS AND STATE PAPERS 865 (1949).

⁴⁰ 1 UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS 382 (1984) [hereinafter cited as COMPENDIUM]. Later relevant materials include the Convention on the Protection of Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) of 1976, *id.* at 370; and the UNESCO Recommendation for the Protection of Movable Cultural Property of 1978, *id.* at 386. In 1985 the Council of Europe promulgated the European Convention on Offences Relating to Cultural Property, ETS No. 119, which adds penal to the more usual civil enforcement of national cultural property retention laws.

The basic purpose of UNESCO 1970, as its title indicates, is to inhibit the "illicit" international trade in cultural objects. The parties agree to oppose the "impoverishment of the cultural heritage" of a nation through "illicit import, export and transfer of ownership" of cultural property (Article 2), agree that trade in cultural objects exported contrary to the law of the nation of origin is "illicit" (Article 3), and agree to prevent the importation of such objects and facilitate their return to source nations (Articles 7, 9 and 13).⁴¹

As of this writing, 58 nations have become parties to UNESCO 1970. Of these, only two could be classified as major market nations: the United States and Canada. None of the other market nations, such as Belgium, France, Germany, Japan, the Netherlands, the Scandinavian nations and Switzerland, are parties.⁴² Most source nations, however, many of them in the Third World, are parties. The reason for this disparity lies in the Convention's purpose: to restrain the flow of cultural property from source nations by limiting its importation by market nations. It is true that the Convention applies only to the "illicit" international traffic in cultural property, but since many source nations have policies that, in effect, prohibit *all* export of cultural property, the distinction as to them is not significant.

By ratifying UNESCO 1970, a market nation commits itself to forgo the further importation of some kinds of cultural property from those source nations that are parties. Why should it do so? The Preamble to the Convention sets out a series of more or less related propositions that state the case for international action, of which the core is the following: "Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting" (emphasis added). The concern is that unauthorized, clandestine excavations and removals are almost always undocumented. A Mayan stele torn from an undeveloped, undocumented site in the jungle of Belize and smuggled to Switzerland to be sold becomes anonymous. Both it and the site have been deprived of valuable archaeological and ethnological information that would have been preserved had the removal been properly supervised and documented, or had the stele remained in place.⁴³

⁴¹ UNESCO 1970 imposes other obligations on the parties: to take steps to ensure the protection of their own cultural property by setting up appropriate agencies, enacting laws and regulations, listing works of major cultural importance, supervising excavations and through education and publicity (Arts. 5, 12 and 14). In general, however, these provisions are much less significant in the international discussion and activity under the Convention. The principal effort is to enlist the market nations to support the restrictions on export adopted by the source nations.

⁴² As this is written, France is reported to be taking the necessary steps to join UNESCO 1970, and the Federal Republic of Germany to be "actively investigating the notion." Letter of Apr. 22, 1986 from Professor P. J. O'Keefe, University of Sydney, to the writer. Professor O'Keefe also reports that Denmark is introducing legislation pursuant to becoming a party, as is Australia.

⁴³ This concern is more fully developed in LEAGUE OF NATIONS, FINAL ACT OF THE INTERNATIONAL CONFERENCE ON EXCAVATIONS 1 ff. (1937); the UNESCO Recommendation Concerning the Preservation of Property Endangered by Public or Private Works of 1968, UNESCO Doc. CFS.68/vi.14x/AFSR; and the European Convention on the Protection of the Archaeological Heritage, May 6, 1969, ETS No. 66, COMPENDIUM, *supra* note 40, at 365.

This concern with "de-contextualization" applies with particular force to undocumented archaeological objects. Others, such as works previously removed from their sites, those remaining in their sites that have been fully documented, and the very large body of artworks and artifacts (e.g., paintings, sculptures, ceramics, jewelry, coins, weapons, manuscripts, etc.) that are movable without significant loss of information, obviously raise no such problem. The quoted preambular provision applies in practice to only a small, though extremely important, proportion of the total trade in stolen and illegally exported cultural objects.

Recent international discussions of cultural property law and policy have been carried on in a special language. One of its characteristics is a tendency toward euphemism. Thus, UNESCO 1970 is largely about national retention of cultural property, but the term "retention" is seldom used. Instead, the dialogue is about "protection" of cultural property—i.e., protection against removal. For example, another clause of the Preamble states: "Considering that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illegal export." One way to read this language is that it imposes an obligation on source nations to care for cultural property in their national territories, and Article 5, paragraphs (c) and (d) of the Convention are consistent with that interpretation.⁴⁴

An alternative reading, however, is that these words justify national retention of cultural property. That is indeed the prevailing interpretation among source nations; the notion that they are obligated by UNESCO 1970 does not arise. When interpreted in this way, the quoted language of the Preamble might be paraphrased as follows: "Considering that it is right for every State to retain cultural property existing within its territory and to prevent its theft, clandestine excavation and export." This intention is made clear in Article 2 of the Convention, which states: "The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property. . . ."

The emphasis on national retention of cultural property is legitimized throughout UNESCO 1970 by use of the term "illicit," which is given an expansive meaning. Article 3 defines as "illicit" any trade in cultural property that "is effected contrary to the provisions adopted under this Convention by the States Parties thereto." Thus, if Guatemala were to adopt legislation and administrative practices that, in effect, prohibited the export of all pre-Columbian artifacts, as it has done, then the export of *any* pre-Columbian object from Guatemala would be "illicit" under UNESCO 1970. Several source nations that are parties to UNESCO 1970 have such laws. This feature of UNESCO 1970 has been called a "blank check" by interests in market

⁴⁴ Examples of international instruments that clearly do seek to impose obligations on nations to protect cultural property are: UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage of 1972, UNESCO Doc. 17/C/107 (Nov. 15, 1972); and UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 1972, 27 UST 37, TIAS No. 8226, 1037 UNTS 151.

nations; the nation of origin is given the power to define "illicit" as it pleases. Dealers, collectors and museums in market nations have no opportunity to participate in that decision. That is why legislation implementing United States adherence to UNESCO 1970 took 10 years to enact.⁴⁵ Dealer, collector and museum interests sought, with some success, to limit the effect on the trade in cultural property that would follow if the United States automatically acquiesced in the retentive policies of some source nations.⁴⁶

Since the promulgation of UNESCO 1970, the attention of source nations has turned to what is now generally called "repatriation": the return of cultural objects to nations of origin (or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed). Beginning in 1973, the United Nations General Assembly adopted a series of resolutions calling for the restitution of cultural property to countries of origin.⁴⁷ In 1978 UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation,⁴⁸ and in 1983 the Council of Europe Parliamentary Assembly adopted a Resolution on Return of Works of Art.⁴⁹ The premises of the repatriation movement are a logical extension of those that underlie UNESCO 1970: cultural property belongs in the source country; works that now reside abroad in museums and collections are wrongfully there (the result of plunder, removal by colonial powers, theft, illegal export or exploitation) and should be "repatriated."⁵⁰

A COMPARISON OF HAGUE 1954 AND UNESCO 1970

We have seen that the Hague 1954 Preamble speaks of "the cultural heritage of all mankind." UNESCO 1970, however, in its Preamble and

⁴⁵ The United States ratified UNESCO 1970 in 1972 but reserved its obligations under the Convention until the enactment by Congress of implementing legislation. The result of a number of efforts and much negotiation, the Convention on Cultural Property Implementation Act was enacted in 1983 as Pub. L. No. 97-446, 96 Stat. 2351 (codified at 19 U.S.C. §§2601-2613 (West Supp. 1986)).

⁴⁶ The provisions of UNESCO 1970 were moderated by the participation of the United States in its drafting. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 370 (1982), republished as THE INTERNATIONAL TRADE IN ART 94 (1982). Their effects were further limited in the United States by reservations and understandings attached to U.S. ratification of the Convention in 1972. J. MERRYMAN & A. ELSER, *supra* note 17, at 2-180 ff. The provisions of the Cultural Property Implementation Act, *supra* note 45, further limit the effects of UNESCO 1970 in the United States by requiring an independent U.S. investigation and determination of the gravity of the allegedly illicit traffic before action is taken under the Convention.

⁴⁷ For a discussion of these resolutions and other components of the repatriation movement, see Nafziger, *The New International Framework for the Return, Restitution, or Forfeiture of Cultural Property*, 15 N.Y.U.J. INT'L L. & POL. 789 (1983).

⁴⁸ See *id.*

⁴⁹ Eur. Parl. Ass., Texts Adopted by the Assembly, 35th Ordinary Sess., pt. 2 (Sept. 26-Oct. 6), Res. No. 808 (1983).

⁵⁰ I will discuss the repatriation movement and the assumptions that underlie use of the term "repatriation" in more detail in another article.

throughout, emphasizes the interests of states in the "national cultural heritage." Hague 1954 seeks to preserve cultural property from damage or destruction. UNESCO 1970 supports retention of cultural property by source nations. These different emphases—one cosmopolitan, the other nationalist; one protective, the other retentive—characterize two ways of thinking about cultural property. I refer to them as "cultural internationalism" and "cultural nationalism." At this writing, cultural nationalism dominates the field; it provides the reigning assumptions and terms of discourse in UNESCO and other international organizations, in national forums and in the literature on cultural property.⁵¹

In some cases the two approaches reinforce each other, but they may also lead in different and inconsistent directions. Thus, in discussing the Greek demand for return of the Elgin marbles from England, the case is easy if only the assumptions and terms of cultural nationalism apply: the marbles are Greek, belong in Greece and should be returned to Greece. But if cultural internationalism is introduced into the discussion, the question becomes much more complex and interesting.⁵² The same is true of almost any other prominent cultural property claim: e.g., should Mexico return the Mayan Codex, stolen by a Mexican (a lawyer!) from the Bibliothèque Nationale in Paris, to France?⁵³

The differences between cultural nationalism and internationalism become particularly significant in cases of what might be called "destructive retention" or "covetous neglect." For example, Peru retains works of earlier cultures that, according to newspaper reports, it does not adequately conserve or display.⁵⁴ If endangered works were moved to some other nation, they might be better preserved, studied and displayed and more widely viewed and enjoyed. To the cultural nationalist, the destruction of national cultural property through inadequate care is regrettable, but might be preferable to its "loss" through export. To a cultural internationalist, the export of threatened artifacts from Peru to some safer environment would be clearly preferable to their destruction through neglect if retained. For example, if they were in Switzerland, Germany, the United States or some other relatively wealthy nation with a developed community of museums and collectors knowledgeable about and respectful of such works, they could be better preserved. By preventing the transfer of fragile works to a locus of higher protection while inadequately preserving them at home, Peru endangers

⁵¹ The leading works include: P. O'KEEFE & L. PROTT, *supra* note 3; Niec, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L. J. 1089 (1976); B. BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY* (1974); K. MEYER, *THE PLUNDERED PAST* (1973).

⁵² See Merryman, *supra* note 5.

⁵³ According to newspaper reports, the Mexican Government now has the Codex and has refused to return it to Paris, claiming that it was stolen from Mexico in the 19th century. Riding, *Between France and Mexico, a Cultural Crisis*, Int'l Herald Tribune, Aug. 31, 1982, at 1; San Francisco Chron., Aug. 19, 1982, at 41.

⁵⁴ Compare *Peru Wages Campaign to Halt Trade in Stolen Treasures*, N.Y. Times, Oct. 4, 1981, at 23; with Schumacher, *Peru's Rich Antiquities Crumbling in Museums*, N.Y. Times, Aug. 15, 1983, §C, at 14, col. 1.

mankind's cultural heritage; hence "destructive retention" or "covetous neglect."

Cultural nationalism and internationalism also diverge in their responses to the practice of hoarding cultural objects, a practice that, while not necessarily damaging to the articles retained, serves no discernible domestic purpose other than asserting the right to keep them.⁵⁵ Thus, multiple examples of artifacts of earlier civilizations reportedly are retained by some nations although such works are more than adequately represented in domestic museums and collections and are merely warehoused, uncataloged, uninventoried and unavailable for display or for study by domestic or foreign scholars. Foreign museums that lack examples of such objects would willingly acquire, study and display (and conserve) them. Foreign dealers and collectors would gladly buy them.

Cultural nationalism finds no fault with the nation that hoards unused objects in this way, despite the existence of foreign markets for them. Cultural internationalism, however, urges that objects of that kind be made available abroad by sale, exchange or loan. In this way, the achievements of earlier cultures of the source nation could be exhibited to a wider audience, the interest of foreigners in seeing and studying such works (their "common cultural heritage") could be accommodated, and the demand that is currently met through the illicit market could be partially satisfied by an open and licit trade in cultural property. It is widely believed that a number of source nations indiscriminately retain duplicates of objects beyond any conceivable domestic need, while refusing to make them available to museums, collectors and dealers abroad.⁵⁶ They forbid export but put much of what they retain to no use. In this way, they fail to spread their culture, they fail to exploit such objects as a valuable resource for trade and they contribute to the cultural impoverishment of people in other parts of the world.⁵⁷

A further criticism of retentive cultural nationalism is that by prohibiting or unduly restricting a licit trade in cultural property, source nations assure

⁵⁵ I will discuss the possible motivations for such hoarding in a separate article; cf. note 5 *supra*.

⁵⁶ Consider the following language from the UNESCO Recommendation Concerning the International Exchange of Cultural Property, *supra* note 19:

Considering that many cultural institutions, whatever their financial resources, possess several identical or similar specimens of cultural objects of indisputable quality and origin which are amply documented, and that some of these items, which are of only minor or secondary importance for these institutions because of their plurality, would be welcomed as valuable accessions by institutions in other countries. . . .

Other provisions of this interesting UNESCO Recommendation urge nations to exchange cultural property with institutions in other nations and are clearly aimed at the hoarding tendency described in the text. As a recommendation, it imposes no legal obligation and, out of tune with the dominant retentive nationalism, has had no discernible impact on source nation practice.

⁵⁷ An eminent colleague has suggested that the expression "cultural impoverishment of people in other parts of the world" is specious and/or excessive. Perhaps. On reflection, however, I think it is valid and, though dramatic, accurate. If the notion of a common human cultural heritage is taken seriously, and if access to the objects that compose it is necessary to its enjoyment, as many believe, then hoarding has the effect I describe.

the existence of an active, profitable and corrupting black market.⁵⁸ Historically, the tighter the export control in the source nation, the stronger has been the pressure to form an illicit market. Source nations generally take the contrary approach, citing the existence of the illicit market as evidence of the need for international controls. The Preamble of UNESCO 1970 incorporates the source nations' argument: the entire Convention is based on the premise that the illicit traffic can be significantly reduced by adopting more extensive legal controls. Opposite assumptions are at work: to the source nations and UNESCO, the existence of the illicit trade justifies further legal controls. To the critic, the extension of legal controls makes more of the traffic illegal and thus, perversely, makes the argument of the source nations and UNESCO self-inflating: more controls produce more illegal trade, which calls for more controls, and so it escalates.

There is ample empirical evidence that retentive laws have not effectively limited the trade in cultural property, but have merely determined the form that traffic takes and the routes it follows. There is little reason to suppose that the illicit traffic will cease as long as the world's peoples have an appetite for access to representative collections of works from the great variety of human cultures. That appetite is the source of the demand for cultural objects. The demand is substantial and, it appears, growing.⁵⁹

If it is true that the demand for cultural objects guarantees that *some* illicit traffic will occur, then the arguments for controlled legalization of the traffic become impressive. For example, Mayan sites in Mexico and Central America currently are mistreated by *huaqueros* who, out of ignorance and the need to act covertly and in haste, do unnecessary damage both to what they take and to what they leave. Their activities, being surreptitious, are not docu-

⁵⁸ See discussion in Bator, *supra* note 46, at 317 ("Ten easy lessons on how to create a black market"); Merryman with Elsen, *Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects*, J. ARTS MGMT. & L., No. 3, Fall 1982, at 5, 16.

⁵⁹ One need not approve of the traffic, or of some of the people who carry it on (avaricious dealers, corrupt police and customs officials, ethically insensitive collectors, cynically acquisitive museum professionals), to observe its existence and comment on its implications. Still, a blanket condemnation of those who participate in the traffic may be too easy: illegal excavations may reveal important works that would otherwise remain hidden; smuggling may save works that would otherwise be destroyed through covetous neglect; the laws prohibiting export may be senselessly overinclusive; etc.

Art dealers are commonly blamed not only for dealing knowingly in illegally obtained cultural objects but for encouraging, instigating, and even (it is sometimes alleged) planning and funding illegal excavations and smuggling. An aroused art historian has complained to me that by writing books on antiquities an important New York dealer has encouraged the demand for, and hence the illegal trade in, cultural objects. The role of dealers in the illegal traffic can be seen in contrasting ways. One view is that the dealer merely serves an already existing demand. The other blames the dealers for creating and nurturing the demand. Some combination of both effects undoubtedly exists, but it is difficult, if one looks at the history of the great private and public collections, to lay major blame for creation of the demand at the feet of dealers. Dealers bring the cultural artifact and the collector or museum together and undoubtedly encourage the demand for their own services and inventories. But the basic demand has its own existence, growing out of people's interest in and curiosity about the human past, nurtured by education, scholarship, and the whole apparatus of museums and exhibitions. Dealers are an easy target, but they are not the source of the problem.

mented; consequently, the objects they remove become anonymous, deprived by the act of removal of much of their value as cultural records. Would it be better if such activities were conducted openly, with the *huaqueros*, doing legally what was formerly illegal, supervised by professionals?⁶⁰ In this way, unnecessary physical damage could be avoided and the work of removal documented. At present, the money paid for illegally removed works goes in part to the *huaqueros* but, in large part, to bribe police and customs officials and to make profits for the criminal entrepreneurs, local and foreign, who conduct the traffic. Would it be better if the income from cultural property sold abroad were available in the nation of origin to support the work of its archaeologists, anthropologists and other professionals, as well as the work of supervised *huaqueros*? Objects that merely replicate works already adequately represented in the source nation are expensive to store properly and constitute a valuable, but unexploited, resource for international trade. Would it be better if such objects were sold and the proceeds used to enrich archaeological, ethnographic and museum activities in the nation of origin?

Some nations with strongly retentive policies clearly lack the resources or the present inclination to care adequately for their extensive stocks of cultural objects. To the cultural internationalist (and to many cultural nationalists), this is tragic. Such objects could be sold to museums, dealers or collectors able and willing to care for them. One way that cultural objects can move to the locus of highest probable protection is through the market. The plausible assumption is that those who are prepared to pay the most are the most likely to do whatever is needed to protect their investment. Yet the UNESCO Convention and national retentive laws prevent the market from working in this way. They impede or directly oppose the market and thus endanger cultural property.⁶¹ It is not necessary, however, to sell pieces of the nation's cultural heritage in order to exploit it. Such objects could be traded to foreign museums for works that would enrich the ability of each nation to expose its own citizens to works from other cultures. They could be deposited on long-term loan in foreign institutions able and willing to care for and display them.

A ONE-SIDED DIALOGUE

I have emphasized the criticisms of retentive cultural nationalism for two reasons. One is that I find these criticisms persuasive. The more important

⁶⁰ See the description of experiments with this strategy in Italy and Germany in J. MERRYMAN & A. ELSEN, *supra* note 17, at 2-112 ff.

⁶¹ The UNESCO Recommendation Concerning the International Exchange of Cultural Property of 1976, *supra* note 19, expresses a clear antimarket bias in its Preamble, stating:

[T]he international circulation of cultural property is still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading.

The recommendation only supports exchanges between institutions, rejecting sales and any form of transaction with collectors and dealers. The market argument is obviously a controversial one and, in any case, needs much fuller discussion, which I will provide in another place.

reason, however, is that in the 1970s and 1980s, the dialogue about cultural property has become one-sided. Retentive nationalism is strongly and confidently represented and supportively received wherever international cultural property policy is made. The structure and context of such discussions, at international organizations and conferences, is congenial to presentation of the position embodied in UNESCO 1970, while the interests represented in Hague 1954 have no prominent or convenient voice. The international agencies that might be expected to represent the more cosmopolitan, less purely nationalist, view on cultural property questions—the United Nations General Assembly and UNESCO in particular—are instead dominated by nations dedicated to the retention and repatriation of cultural property. First World–Third World and capitalist-socialist politics combine with romantic Byronism⁶² to stifle the energetic presentation of the views of market nations. As a result, the voice of cultural internationalism is seldom heard and less often heeded in the arenas in which cultural policy is made.

The danger is that UNESCO 1970, with its exclusive emphasis on nationalism, will further legitimize questionable nationalist policies while stifling cultural internationalism. The only hint of recognition of these realities in UNESCO 1970 occurs in a pallid and generally ignored clause in the Preamble describing the benefits of the international interchange of cultural property: "Considering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations." The rest of the Convention, including the Preamble, provides unqualified support for retentive cultural nationalism.⁶³

In the United States, a major cultural property market nation, the tide runs strongly against the forces of cultural internationalism. The United States has never become a party to Hague 1954.⁶⁴ It has, however, ratified UNESCO 1970 and enacted implementing legislation under it.⁶⁵ The United States has also supported the retentive nationalist position through a bilateral treaty with Mexico,⁶⁶ executive agreements with Peru⁶⁷ and Guatemala,⁶⁸

⁶² The element of romance in cultural nationalism and the influence of Byron in creating and nurturing it are discussed in Merryman, *supra* note 5, at 1903–05.

⁶³ To UNESCO's credit, some efforts at a broader, less exclusively nationalistic approach have been made in some of its recommendations, previously cited in this article. *See in particular* the Recommendation Concerning the International Exchange of Cultural Property, *supra* note 19. That instrument's formal status as a mere recommendation, however, combined with its antimarket bias, deprives it of any practical force.

⁶⁴ For an exchange of correspondence setting out the official reasons for U.S. refusal to sign Hague 1954, see J. MERRYMAN & A. ELSEN, *supra* note 17, at 1-75–1-77.

⁶⁵ *See* note 45 *supra*.

⁶⁶ Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, United States–Mexico, 22 UST 494, TIAS No. 7088, 791 UNTS 313.

⁶⁷ Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, United States–Peru, TIAS No. 10136.

⁶⁸ Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, May 21, 1984, United States–Guatemala (not yet published).

legislation controlling the importation of pre-Columbian monumental sculpture and murals,⁶⁹ executive action,⁷⁰ aggressive administrative action by the U.S. Customs Service⁷¹ and criminal prosecution of smugglers.⁷² Indeed, the United States (together with Canada) is of all cultural property market nations the most strongly committed, both in declaration and action, to the enforcement of other nations' retentive laws and policies,⁷³ though it freely permits the export of cultural property from its own national territory.⁷⁴

This paradoxical policy began in the late 1960s, when the United States decided to participate in drafting what eventually became UNESCO 1970.⁷⁵ Until then, the national policy had been consistent: works of art and other cultural property could be freely imported without duty and could be freely exported. The United States was committed to free trade in cultural property. Works stolen abroad and brought into the United States could of course be recovered by their owners in civil actions before state or federal courts, as had long been the rule in all nations.⁷⁶ The novelty was the gradual

⁶⁹ Pub. L. No. 92-587, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§2091-2095 (1982)).

⁷⁰ See discussion of "The Boston Raphael" in J. MERRYMAN & A. ELSEN, *supra* note 17, at 2-7 ff.

⁷¹ Fitzpatrick, *A Wayward Course: The Lawless Customs Policy toward Cultural Property*, 15 N.Y.U.J. INT'L L. & POL. 857 (1983). Proposed legislation that would limit Customs Service activities is at this writing before Congress but appears unlikely to pass.

⁷² *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). Both cases were prosecutions under a U.S. statute punishing transportation of stolen property in interstate or foreign commerce. McClain had illegally removed pots and beads from Mexico; Hollinshead had illegally removed a stele from a Mayan site, Machiquila, in Guatemala. Both had brought the objects into the United States for sale. In both cases, the courts treated the removals in violation of the foreign laws as "thefts" under the U.S. statute and upheld the convictions.

⁷³ Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U.J. INT'L L. & POL. 757 (1983).

⁷⁴ Freedom of export of cultural property from the United States was significantly limited for the first time in 1979 by §470ee of the Archaeological Resources Protection Act, Pub. L. No. 96-95, 93 Stat. 721, 724 (codified at 16 U.S.C. §470aa-470ll (1982)), which, however, applies only to objects illegally taken from "public lands and Indian lands"—i.e., to lands under federal ownership or protective jurisdiction.

⁷⁵ For a brief explanation of the reasons for U.S. involvement in the project that culminated in UNESCO 1970, see Bator, *supra* note 46, at 370.

⁷⁶ A recent example is *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (two Dürer portraits stolen at the end of World War II ordered returned to East Germany). Such actions are of course subject to the normally applicable rules protecting good faith purchasers and to rules limiting the time within which actions to recover property may be brought. The International Institute for the Unification of Private Law in Rome is currently studying proposals that good faith purchasers of cultural property should receive less protection than is normally given them under the laws of most European nations. The proposals would bring the European rules closer in effect to those in the United States, which are generally less protective of bona fide purchasers and thus more protective of owners. There is a brief description of the Institute's work on this topic in 1986 REVUE INTERNATIONALE DE DROIT COMPARÉ 130-31. As to limitation of actions, a bill entitled "The Cultural Property Repose Act" is at this writing before the United States Congress. If enacted, it would sharply reduce the period of the applicable statute of limitations in actions brought by foreign owners to recover stolen cultural objects. It appears unlikely to pass. A similar bill passed by the New York legislature was vetoed by the Governor on July 28, 1986. N.Y. Times, July 29, 1986, at 21.

introduction, over a period beginning around 1970, of a growing number and variety of restrictions on the importation of cultural property in response to the retentive policies of source nations. Despite the occasionally successful efforts of collector, dealer and museum interests to moderate this response, the general direction in the United States has been one of support for cultural nationalism.

CONCLUSION

Both ways of thinking about cultural property are in some measure valid. There are broad areas in which they operate to reinforce each other's values. Those are the easy cases. The interesting ones arise when the two ways of thinking lead in different directions. Then distinctions have to be made, questions require refinement and it becomes necessary to choose. Thus, any cultural internationalist would oppose the removal of monumental sculptures from Mayan sites where physical damage or the loss of artistic integrity or cultural information would probably result, whether the removal was illegal or was legally, but incompetently, done.⁷⁷ The same cultural internationalist, however, might wish that Mexico would sell or trade or lend some of its reputedly large hoard of unused *Chac-Mols*, pots and other objects to foreign collectors⁷⁸ and museums, and he might be impatient with the argument that museums in other nations not only should forgo building such collections but should actively assist Mexico in suppressing the "illicit" trade in those objects. In principle, any internationalist would agree that paintings should not be stolen from Italian churches for sale to foreign (or domestic) collectors or museums. But if a painting is rotting in the church from lack of resources to care for it, and the priest sells it for money to repair the roof and in the hope that the purchaser will give the painting the care it needs, then the problem begins to look different.⁷⁹ Even the most dedicated cultural nationalist will find something ludicrous in the insistence that a Matisse painting that happened to be acquired by an Italian collector had become an essential part of the Italian cultural heritage.⁸⁰

More fundamentally, the basis of cultural nationalism and the validity of its premises seem to require reexamination. In a world organized into nation-

⁷⁷ Although, if the site is a neglected one and the removal saves works that would otherwise crumble away, a crude and undocumented job of removal might still be preferable from the cultural internationalist point of view.

⁷⁸ A distinguished colleague has questioned the desirability of permitting such works to fall into the hands of collectors because they will not be available for public viewing and study, and the opportunity to monitor the quality of care they receive is limited. These are important considerations, but if the alternative is to leave them in a place where they are unavailable for viewing and study and receive no attention from qualified conservators, a collector may be preferable. Eventually, many works of museum quality in the hands of private collectors find their way to museums.

⁷⁹ See Stewart, *Two Cheers for the Tombaroli*, NEW REPUBLIC, Apr. 28, 1973, at 21 ("per piacere, rubatelo!"); Luna, *The Protection of the Cultural Heritage: An Italian Perspective*, in UNITED NATIONS SOCIAL DEFENCE RESEARCH INSTITUTE, *THE PROTECTION OF THE ARTISTIC AND ARCHAEOLOGICAL HERITAGE* 164 (1976).

⁸⁰ *Jeanneret v. Vichy*, 693 F.2d 259 (2d Cir. 1982).

states and in a system of international law in which the state is the principal player, an emphasis on nationalism is understandable. But the world changes, and with it the centrality of the state. A concern for humanity's cultural heritage is consistent with the emergence of international laws and institutions protecting human rights.⁸¹ A slighter emphasis on cultural nationalism is consistent with the relative decline of national sovereignty that characterizes modern international law. In the contemporary world, both ways of thinking about cultural property have their legitimate places. Both have something important to contribute to the formation of policy, locally, nationally and internationally, concerning pieces of humanity's material culture. But where choices have to be made between the two ways of thinking, then the values of cultural internationalism—preservation, integrity and distribution/access⁸²—seem to carry greater weight. The firm, insistent presentation of those values in discussions about trade in and repatriation of cultural property will in the longer run serve the interests of all mankind.

⁸¹ See UNESCO, CULTURAL RIGHTS AS HUMAN RIGHTS, STUDIES AND DOCUMENTS ON CULTURAL POLICIES No. 3 (1970).

⁸² See Merryman, *supra* note 5, at 1916–21.

TREATY INTERPRETATION BY THE EXECUTIVE BRANCH: THE ABM TREATY AND "STAR WARS" TESTING AND DEVELOPMENT

By Kevin C. Kennedy*

In the latest interpretation of the 13-year-old Anti-Ballistic Missile Treaty¹ (ABM Treaty)—one that stunned the arms control community²—the Reagan administration announced on October 6, 1985,³ that the United States is authorized under the Treaty to develop and test advanced technology, space-based weapons systems such as lasers and particle beam weapons.⁴ According to the administration, the ABM Treaty places no restrictions, short of actual deployment, on the Strategic Defense Initiative (SDI), the so-called Star Wars program.⁵ Although Secretary of State George Shultz has stated that the United States will continue to exercise restraint in the SDI program by limiting the development and testing of weapons according to a "restrictive"

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¹ Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 UST 3435, TIAS No. 7503 [hereinafter cited as ABM Treaty].

² N.Y. Times, Oct. 17, 1985, at A6, col. 1; Christian Sci. Monitor, Oct. 17, 1985, at 1, col. 2; Miami Herald, Oct. 21, 1985, at 13A, col. 1.

³ See Weinberger, *U.S. Defense Strategy*, 64 FOREIGN AFF. 675, 679 (1986). The announcement came through then National Security Adviser Robert C. McFarlane on the NBC television program "Meet the Press." ECONOMIST, Nov. 2, 1985, at 21, col. 1.

⁴ For a description of the types of advanced technology weapons being considered under the Strategic Defense Initiative program (SDI), see Grier & Armstrong, *Star Wars, Will It Work?* (six-part series), Christian Sci. Monitor, Nov. 4, 1985, at 28-30; Nov. 5, 1985, at 20-21; Nov. 6, 1985, at 20-22; Nov. 7, 1985, at 20-21; Nov. 8, 1985, at 18-20; Nov. 12, 1985, at 30-32. For a discussion of the potential effectiveness of SDI, see Guertner, *What Is "Proof"?*, FOREIGN POL'Y, No. 59, Summer 1985, at 73; Bennett, *"Star Wars": The Battle Intensifies*, Christian Sci. Monitor, Nov. 4, 1985, at 26, col. 2. See also Weinberger, *SDI: Realities and misconceptions*, Christian Sci. Monitor, Oct. 17, 1985, at 16, col. 2. For a discussion of the Soviet Union's response to SDI, see Rivkin, *What Does Moscow Think?*, FOREIGN POL'Y, No. 59, Summer 1985, at 85.

⁵ ECONOMIST, Nov. 2, 1985, at 21; Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 1. For example, Assistant Secretary of Defense Richard N. Perle stated on Oct. 16, 1985: "In my judgment there is one correct view of what the [ABM] treaty provides." He continued:

After one wades through all the ambiguities and reads carefully the text of the treaty itself and the negotiating record . . . with respect to systems based on "other physical principles" [such as lasers and directed-energy weapons], we have the legal right under the treaty to conduct research and development and testing unlimited by the terms of the treaty. . . .

Id. For an excellent analysis of the legality of the SDI program vis-à-vis the ABM Treaty, see A. SHERR, *LEGAL ISSUES OF THE "STAR WARS" DEFENSE PROGRAM* (Lawyers Alliance for Nuclear Arms Control Monograph, 1984).

interpretation⁶ of the ABM Treaty, the question remains whether a legally sound basis exists for the administration's "permissive" interpretation of the Treaty.⁷

This article examines two interrelated questions raised by the Reagan administration's October 6 announcement. The first is whether the administration's permissive reading of the ABM Treaty squares with the consenting Senate's understanding of that Treaty. To what exactly did the Senate give its advice and consent when it advised ratification of the ABM Treaty in 1972? As a corollary, this article discusses the fundamental constitutional question posed when a treaty interpretation by the executive branch is arguably at odds with the consenting Senate's understanding of the treaty.⁸ We begin with a brief overview of the SDI program, followed by a background discussion of the ABM Treaty.

I. THE STRATEGIC DEFENSE INITIATIVE PROGRAM

In a nationally televised speech on March 23, 1983,⁹ President Reagan launched the Strategic Defense Initiative program, an ostensibly defensive weapons system intended to replace the 25-year-old nuclear regime of mutual assured destruction or MAD.¹⁰ As the President asked rhetorically in his March 23 address, "What if free people could live secure in the knowledge that their security did not rest upon the threat of instant U.S. retaliation to deter a Soviet attack, that we could intercept and destroy strategic ballistic missiles before they reached our own soil or that of our allies?"¹¹ The Pres-

⁶ Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 1. At the same time, Secretary Shultz did not reject the new interpretation of the ABM Treaty. *Id.*

⁷ For an excellent background discussion of SDI and the ABM Treaty, see A. SHERR, *supra* note 5; Note, *Star Wars Meets the ABM Treaty: The Treaty Termination Controversy*, 10 N.C.J. INT'L L. & COM. REG. 701 (1985). For a history of the strategic arms negotiating record of the Reagan administration through 1984, see S. TALBOTT, *DEADLY GAMBITS: THE REAGAN ADMINISTRATION AND THE STALEMATE IN NUCLEAR ARMS CONTROL* (1984). See generally C. GRAY, *AMERICAN MILITARY SPACE POLICY* (1982); P. STARES, *THE MILITARIZATION OF SPACE, U.S. POLICY, 1945-1984* (1985).

⁸ The question whether the Reagan administration's reading of the ABM Treaty is consistent with the international law of treaty interpretation is beyond the scope of this article. For a background discussion on this subject, see Note, *supra* note 7, at 720-25. See generally I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 623-30 (1979); A. MCNAIR, *THE LAW OF TREATIES* (1961).

⁹ Address to the Nation on Defense and National Security, 19 WEEKLY COMP. PRES. DOC. 437 (Mar. 28, 1983) [hereinafter cited as President's Address].

¹⁰ *Id.* at 442-43. See Weinberger, *supra* note 2, at 680-81. For a general discussion of nuclear deterrence theory, see P. GREEN, *DEADLY LOGIC: THE THEORY OF NUCLEAR DETERRENCE* (1966); Keeny & Panofsky, *MAD versus NUTS*, 60 FOREIGN AFF. 287 (1981-82); Kennedy, *A Critique of United States Nuclear Deterrence Theory*, 9 BROOKLYN J. INT'L L. 35 (1983).

¹¹ President's Address, *supra* note 9, at 442. The Reagan administration's SDI program contemplates a "layered" defense system that would intercept incoming Soviet missiles at various phases of their flight path, from boost to terminal phase. For an overview of the weapons systems under consideration, see U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *BALLISTIC MISSILE DEFENSE TECHNOLOGIES* (1985); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *DIRECTED ENERGY MISSILE DEFENSE IN SPACE—A BACKGROUND PAPER* (1984); Bethe, Garwin, Gottfried & Kendall, *Space-Based Ballistic-Missile Defense*, 251 SCI. AM., No. 4, October

ident concluded his remarks by expressly assuring listeners that SDI would be conducted consistently with U.S. obligations under the ABM Treaty.¹²

The SDI program's focus is on "the whole spectrum of offensive nuclear ballistic missiles, not just long-range missiles aimed at the U.S."¹³ Research is being conducted in the basic areas of directed-energy weapons such as lasers and particle beam weapons, and kinetic-energy weapons such as rail guns that can launch objects at enormous velocities.¹⁴ The mission and near-term goals of SDI have been publicly elaborated on by representatives of the Reagan administration on various occasions. For example, in hearings before the House Subcommittee on Defense Appropriations held on May 7, 1985, Lieutenant General James A. Abrahamson, Director of the Strategic Defense Initiative Organization, explained the goals of the SDI program:

The goal of the SDI is to conduct a program of vigorous research focused on advanced technologies that could provide a basis for a future decision to further develop and deploy strategic defenses The driving force behind [the President's] concept is to render nuclear ballistic missiles impotent and obsolete SDI is a research program that seeks to provide the technical knowledge required to support a

1984, at 39-49; Grier & Armstrong, *supra* note 4, Nov. 4, 1985, at 28-30. For additional views on the feasibility of SDI, see *Department of Defense Authorization for Appropriations for Fiscal Year 1985: Hearings on S.2414 Before the Senate Comm. on Armed Services*, 98th Cong., 2d Sess. 2893-3128 (1984). For an administration description of SDI technology research programs, see *Department of Defense Authorization for Appropriations for Fiscal Year 1986: Hearings on S.674 Before the Subcomm. on Strategic and Theater Nuclear Forces of the Senate Comm. on Armed Services*, 99th Cong., 1st Sess. 4050-4127 (1985) [hereinafter cited as *Senate Hearings*].

¹² President's Address, *supra* note 9, at 443. Although the Strategic Defense Initiative ultimately envisions the militarization of space once it advances beyond the research phase and enters the development and testing phases, President Reagan made no mention of the possible impact SDI would have, for example, on the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 UST 2410, TIAS No. 6347, 610 UNTS 205 (entered into force Oct. 10, 1967), popularly known as the Outer Space Treaty. Article III of the Outer Space Treaty obligates parties to carry on their activities in space in accordance with international law, "in the interest of maintaining peace and security and promoting international cooperation and understanding." Article IV of the Outer Space Treaty forbids the stationing or placing in orbit around the Earth of "any objects carrying nuclear weapons or any other kinds of weapons of mass destruction." Article IV also bans the testing of any type of weapon on the moon and other celestial bodies. In the effort to capture the high frontier of outer space, it is not inconceivable that SDI could eventually entail the development and testing of weapons platforms that are moon based. However, at least insofar as the public declarations on the SDI program are concerned, to date no mention has been made of moon-based activities. For a discussion of conformity of SDI with other treaty obligations of the United States (such as the Limited Test Ban Treaty), see Note, *supra* note 7, at 706-09.

For additional administration views and testimony on SDI and U.S. compliance with the ABM Treaty, see *Senate Hearings*, *supra* note 11, at 4139-47.

¹³ Weinberger, *supra* note 4, at 16, col. 2. For additional administration views and testimony on SDI, see *Senate Hearings*, *supra* note 11, at 3437-3525, 3972-4008.

¹⁴ See *Department of Defense Appropriations for 1986: Hearings Before the Subcomm. on Defense Appropriations of the House Comm. on Appropriations*, 99th Cong., 1st Sess. 584-85 (1985) [hereinafter cited as *House Hearings*]; Grier & Armstrong, *supra* note 4, Nov. 4, 1985, at 28-30.

decision on whether to develop and later deploy advanced defensive systems. It is not a program to deploy those systems.¹⁵

General Abrahamson went on to express his views on how SDI squares with the ABM Treaty, presenting what has come to be considered the "restrictive" interpretation of the Treaty:

The ABM Treaty prohibits the development, testing, and deployment of ABM systems and components that are space-based, air-based, sea-based, or mobile land-based. However, as Gerard Smith, chief U.S. negotiator of the ABM Treaty, reported to the Senate Armed Services Committee in 1972, that agreement does permit research short of field testing of a prototype ABM system or breadboard model. Our research under the SDI program will be within those limits.¹⁶

Thus, so long as it is limited to research, the SDI program arguably does not breach the ABM Treaty even under the "restrictive" interpretation of the Treaty. As is explained below,¹⁷ it is universally agreed that antiballistic missile research in any basing mode is not prohibited under the Treaty. Nevertheless, assurances by the Reagan administration of Treaty compliance notwithstanding, the SDI program is planned to evolve through four progressively more sophisticated phases, the first of which is limited to research through the 1990s. Thereafter, the program will enter the development and deployment phases, depending on the progress of the research phase.¹⁸ Until then, the question whether SDI violates the ABM Treaty will be academic. If and when these later development phases of the SDI program are entered, however, SDI will threaten to breach the ABM Treaty in its present form. For, as the next two sections explain, it is far from clear that the ABM Treaty permits development, let alone deployment, of SDI technologies.

II. THE ABM TREATY

The ABM Treaty was the product of the Strategic Arms Limitation Talks (SALT), a process formally begun in November 1969,¹⁹ but whose genesis may be traced back 5 years earlier. In 1964, President Johnson delivered a message to the Eighteen-Nation Disarmament Conference in Geneva in

¹⁵ *House Hearings*, *supra* note 14, at 568-69. The price tag on SDI research through fiscal year 1989 has been placed at \$26 billion. *Id.* at 569. Congress approved 74% of the Defense Department's FY 1986 budget request for SDI research. Weinberger, *supra* note 2, at 682.

¹⁶ *House Hearings*, *supra* note 14, at 569. Secretary of Defense Caspar Weinberger has expressed a similar sensitivity to compliance with the ABM Treaty, stating that "SDI is a research program . . . and is in complete accord with the ABM Treaty." Weinberger, *supra* note 4, at 16, col. 3. A breadboard model is an experimental arrangement to test feasibility. WEBSTER'S NEW COLLEGIATE DICTIONARY 134 (1981).

¹⁷ See *infra* notes 43-45 and accompanying text.

¹⁸ *House Hearings*, *supra* note 14, at 581-82.

¹⁹ See T. WOLFE, *THE SALT EXPERIENCE* 1-3 (1979); UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, *ARMS CONTROL AND DISARMAMENT AGREEMENTS* 132-33 (1980) [hereinafter cited as ACDA AGREEMENTS].

which he proposed that Washington and Moscow explore a verified freeze on strategic offensive and defensive weapons. It was not until October 1969, however, that the White House and the Kremlin announced that SALT would begin in Helsinki on November 17, 1969.²⁰

Following 2½ years of negotiations,²¹ the first round of SALT was concluded on May 26, 1972, when President Nixon and General Secretary Brezhnev signed²² the ABM Treaty and the Interim Agreement on strategic offensive arms.²³ The Senate advised ratification of the ABM Treaty on August 3, 1972; President Nixon ratified the Treaty on September 30, 1972; and it entered into force on October 3, 1972, following a formal exchange of ratification instruments.²⁴ The Treaty is of unlimited duration.²⁵ The parties agreed to a protocol to the Treaty in 1974.²⁶

In broad outline, the ABM Treaty, together with the protocol, limits the United States and the Soviet Union each to one ABM deployment area,²⁷ so restricted and so located that it cannot provide a nationwide ABM defense or become the basis for developing one.²⁸ At the ABM site, there may be no more than one hundred interceptor missiles and one hundred launchers.²⁹

²⁰ T. WOLFE, *supra* note 19, at 1-3.

²¹ For a brief history of those negotiations, see *id.* at 8-14; S. TALBOTT, *ENDGAME: THE INSIDE STORY OF SALT II* 19-24 (1980).

²² See ACDA AGREEMENTS, *supra* note 19, at 135.

²³ Interim Agreement between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, 23 UST 3462, TIAS No. 7504. For the etymology of "SALT," see S. TALBOTT, *supra* note 21, at 19 n.*.

²⁴ ABM Treaty, *supra* note 1, 23 UST 3435.

²⁵ *Id.*, Art. XV, para. 1, 23 UST at 3446.

²⁶ Protocol to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, 27 UST 1645, TIAS No. 8276 [hereinafter cited as ABM Protocol].

²⁷ *Id.*, Art. I, 27 UST at 1646. The Soviet Union has in place an ABM system defending Moscow. The ABM system at Grand Forks, North Dakota, was dismantled by the United States in the mid-1970s. See T. WOLFE, *supra* note 19, at 13 n.75; ACDA AGREEMENTS, *supra* note 19, at 161.

²⁸ ABM Treaty, *supra* note 1, Art. I, 23 UST at 3436.

²⁹ *Id.*, Art. III, 23 UST at 3440. Article III provides:

Each Party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

Quantitative restrictions have thus been placed on radars as well. *Id.*

In addition to these quantitative restrictions, technological improvements are likewise limited; for example, both parties are prohibited from developing, testing or deploying ABM launchers capable of launching more than one interceptor missile at a time.³⁰

As concerns permissible basing modes, the Treaty permits deployment of an ABM system that is fixed and land based.³¹ While Article III of the Treaty describes in some detail the permissible basing mode of an ABM system, it does not state *in haec verba* that the ABM system shall be fixed and land based. However, Article V, paragraph 1 of the Treaty indicates that this was the parties' intention: "Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."³² If Article III is read in conjunction with Article V, the ABM Treaty permits only a fixed, land-based deployment mode of ABM systems or components. This conclusion is buttressed by one of the several "Common Understandings" that were reached between the U.S. and Soviet delegations during the Treaty negotiations.³³ Common Understanding C provides:

On January 29, 1972, the U.S. Delegation made the following statement:

Article V(1) of the Joint Draft Text of the ABM Treaty includes an undertaking not to develop, test, or deploy mobile land-based ABM systems and their components. On May 5, 1971, the U.S. side indicated that, in its view, a prohibition on deployment of mobile ABM systems and components would rule out the deployment of ABM launchers and radars which were not permanent fixed types. At that time, we asked for the Soviet view of this interpretation. Does the Soviet side agree with the U.S. side's interpretation put forward on May 5, 1971?

On April 13, 1972, the Soviet Delegation said there is a general common understanding on this matter.³⁴

The Reagan administration has not challenged this understanding that the ABM Treaty, together with the ABM Protocol, permits each side to *deploy* only one fixed, land-based ABM system; rather, the current debate centers on the permissibility of *developing and testing* advanced technology weapons systems based in space. The debate over what the ABM Treaty permits vis-à-vis SDI is fueled by Article V, paragraph 1 of the Treaty and Agreed Statement D,³⁵ also a part of the Treaty,³⁶ which are discussed below.

³⁰ *Id.*, Art. V, para. 2, 23 UST at 3441.

³¹ *See id.*, Art. III, 23 UST at 3440.

³² *Id.*, Art. V, para. 1, 23 UST at 3441.

³³ As part of the ABM Treaty, several Agreed Statements, Common Understandings and Unilateral Statements were appended to the Treaty. *See* Agreed Statements, Common Understandings, and Unilateral Statements Regarding the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missiles, May 26, 1972, 23 UST 3456, TIAS No. 7504.

³⁴ *Id.*, Common Understanding C, 23 UST at 3458.

³⁵ *See infra* note 46 and accompanying text.

³⁶ Gerard Smith, chief negotiator for the United States in the SALT I negotiations, has written:

As has been noted,³⁷ Article V prohibits each party from developing, testing or deploying an ABM system or component other than one that is fixed and land based. While deployment means putting a fully operational ABM system or component into service, what "developing and testing" a prohibited ABM system or component consists of has not been entirely free of doubt. Given the technological limitations on verification, the consensus is that, at a minimum, laboratory research is permitted in connection with any type of ABM basing mode.³⁸ Allowing all types of ABM research essentially amounts to recognizing that verification by "national technical means,"³⁹ the only method of verification permitted under the ABM Treaty,⁴⁰ is practically impossible. Attempting to ban by treaty conduct that cannot be verified is considered naive in the highly sensitive area of arms control. Since "research" thus constitutes activities short of "development" as contemplated under the Treaty, so long as the SDI program is limited to research, it does not violate the Treaty.

As for what constitutes "development," during the SALT I negotiations the parties never reached agreement on a definition of that term,⁴¹ intentionally leaving it ambiguous. At the 1972 Senate hearings on the ABM Treaty, Dr. John S. Foster, Director of Defense Research and Engineering, offered the following explanation of "development": "[A] prohibition on development . . . would begin only at the stage where laboratory testing ended on ABM components, on either a proto-type or bread-board model."⁴²

Gerard Smith, the chief U.S. negotiator for the ABM Treaty, echoed Dr. Foster's explanation when he testified before the Senate Armed Services Committee in 1972. Ambassador Smith stated that the prohibitions on development contained in the ABM Treaty "would start at that part of the development process where field testing is initiated on either a prototype or breadboard model."⁴³ Although these two statements furnish less than a "bright line" definition of the term "development," they do suggest that, at the least, certain kinds of development that can be detected by national

[S]ystems employing possible future types of components to perform the function of launchers, interceptors and radars are banned unless the Treaty is amended. [Agreed Statement D] was initialed by Semenov [the Soviet Union's negotiator] and me on the day the SALT agreements were signed. As an initialed common understanding, it is as binding as the text of the ABM Treaty.

G. SMITH, DOUBLETALK: THE STORY OF THE FIRST STRATEGIC ARMS LIMITATION TALKS 344 (1980).

³⁷ See *supra* note 32 and accompanying text.

³⁸ Christian Sci. Monitor, Oct. 4, 1985, at 3, col. 3 ("The treaty, for instance, allows research on all types of ABM systems and components").

³⁹ "National technical means of verification" is a euphemism for satellite reconnaissance, radar and other information collection techniques short of espionage and on-site inspection. ACDA AGREEMENTS, *supra* note 19, at 135; T. WOLFE, *supra* note 19, at 13-14.

⁴⁰ ABM Treaty, *supra* note 1, Art. XII, 23 UST at 3443.

⁴¹ Christian Sci. Monitor, Oct. 4, 1985, at 4, col. 3.

⁴² *Military Implications of the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Comm. on Armed Services*, 92d Cong., 2d Sess. 275 (1972) [hereinafter cited as *Military Implications*].

⁴³ *Id.* at 377.

technical means—e.g., rudimentary field testing, as opposed to laboratory testing—may come within the prohibitory ambit of the ABM Treaty.

In any event, the crux of the argument made by the Reagan administration is not that SDI "development and testing" somehow differs from "development and testing" as used in the prohibitory provisions of the ABM Treaty. Rather, its contention, far from being built on such semantics, has as its cornerstone Agreed Statement D, which, the administration maintains, specifically permits all SDI development and testing in any basing mode, short of actual deployment.⁴⁴ If new ABM systems or components are created that, in the language of Agreed Statement D, are "based on other physical principles," then, according to the administration, any limitation on their development and testing would be subject to further discussion and agreement between the United States and the Soviet Union.⁴⁵

Does Agreed Statement D, when read in the context of the ABM Treaty considered as a whole, support the administration's view? Agreed Statement D provides:

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.⁴⁶

Richard N. Perle, Assistant Secretary of Defense for International Security Policy and one of the chief architects of the Reagan administration's permissive interpretation of the ABM Treaty,⁴⁷ has stated that the development and testing of exotic space-based weapons employing "other physical principles" such as lasers and particle beams is permitted under Agreed Statement D.⁴⁸ In his view, if new ABM systems "based on other physical principles" are created, limitations on them would be subject to further negotiation and agreement between the United States and the Soviet Union.⁴⁹

Another representative of the Reagan administration, Paul H. Nitze, a veteran arms control negotiator and senior arms control adviser to the President,⁵⁰ has argued that the negotiating record of the ABM Treaty shows that the United States attempted to close the door on all new defensive weapons but that the Soviet Union would not agree to such a proposal.⁵¹

⁴⁴ See *supra* note 5.

⁴⁵ Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 2; *Prognosis for an Ex-Virgin*, ECONOMIST, Nov. 2, 1985, at 14; N.Y. Times, Oct. 17, 1985, at A6, col. 1.

⁴⁶ ABM Treaty, *supra* note 1, Agreed Statement D, 23 UST at 3456. For a comment on the purpose of such Agreed Statements, see *infra* note 63.

⁴⁷ Christian Sci. Monitor, Oct. 17, 1985, at 36, cols. 1-3; N.Y. Times, Oct. 17, 1985, at A6, cols. 5-6.

⁴⁸ *Id.*

⁴⁹ Christian Sci. Monitor, Oct. 17, 1985, at 36, cols. 1-3.

⁵⁰ *Id.*, Oct. 24, 1985, at 5, col. 1; N.Y. Times, Oct. 17, 1985, at 6, col. 5.

⁵¹ Christian Sci. Monitor, Oct. 24, 1985, at 5, col. 1; N.Y. Times, Oct. 17, 1985, at 6, col. 5.

Hence, Agreed Statement D was appended to the Treaty to take account of the Soviet position that the ABM Treaty should not rule out the possibility of developing and testing future technologies based on other physical principles.⁵² In addition, Abraham D. Sofaer, Legal Adviser of the State Department, has also taken the position that the ABM Treaty, when read in the light of Agreed Statement D, only prohibits the actual deployment of new systems based on "other physical principles," not their development or testing.⁵³

In short, in the view of several key persons within the Reagan administration, Agreed Statement D on exotic technologies is to be read in conjunction with and as an expansion of Article V of the Treaty, not as a limitation on the basing modes and systems permitted under Article III.⁵⁴

Critics of the administration's interpretation of Agreed Statement D—whose numbers include the chief negotiator of the ABM Treaty, Gerard Smith⁵⁵—counter that Agreed Statement D was meant to supplement Article III of the Treaty, which permits a fixed, land-based ABM system of interceptor missiles and radars, not an ABM system of space-based lasers and particle beam weapons. Agreed Statement D was not meant to qualify Article V, paragraph 1, they maintain, which prohibits the development and testing of ABM weapons in all other basing modes.⁵⁶ Accordingly, in their view, Agreed Statement D only allows the development and testing of new technologies that are introduced to replace fixed, land-based ABM systems or their components.⁵⁷

Agreed Statement D is not the most happily drafted of provisions, nor is it free of ambiguity, reading as though meant to be the international lawyer's answer to the Internal Revenue Code. Moreover, throughout this debate scant attention has been paid to how the Senate viewed the ABM Treaty at the time it gave its advice and consent to ratification.⁵⁸ A review of the legislative history is illuminating, for it supports the position of those critics who have challenged the Reagan administration's permissive interpretation of the ABM Treaty.

III. THE SENATE ABM TREATY HEARINGS

During the summer of 1972, the Senate Committee on Foreign Relations and the Senate Committee on Armed Services held extensive hearings on

⁵² Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 3.

⁵³ N.Y. Times, Oct. 17, 1985, at 6, col. 4. The terms "ABM systems or components" found throughout the Treaty are not defined, which thus gives rise to an ambiguity over what constitutes prohibited systems or components under the Treaty. The SDI technologies being contemplated have been characterized by the Reagan administration as ABM "subcomponents" or "adjuncts," and therefore as not being prohibited under the Treaty. *Id.*

⁵⁴ *Id.*

⁵⁵ ECONOMIST, Nov. 2, 1985, at 21; Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 2.

⁵⁶ See sources cited in note 47 *supra*.

⁵⁷ See sources cited in note 47 *supra*. In addition, Article I of the Treaty prohibits deployment of a nationwide antiballistic missile defense. See *supra* note 28 and accompanying text.

⁵⁸ See Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 3.

the ABM Treaty,⁵⁹ pursuant to the Senate's constitutional advise-and-consent role.⁶⁰ The Foreign Relations Committee conducted 7 days of hearings, beginning on June 19, 1972.⁶¹ The first witness called was Secretary of State William P. Rogers, who gave the following testimony about the qualitative restrictions imposed by the Treaty: "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems, i.e., systems depending on such devices as lasers, may not be deployed, even in permitted areas."⁶² Later in his testimony, Rogers reiterated the point: "Under the agreement we provide that exotic ABM systems may not be deployed and that would include, of course, [an] ABM system based on the laser principle."⁶³

The next witness to appear before the committee was Ambassador Gerard Smith, at that time the Director of the U.S. Arms Control and Disarmament Agency and the chief U.S. negotiator of the ABM Treaty. He echoed Secretary Rogers's views on the deployment of exotic weapons: "[W]e have covered the concern of yours in this treaty by prohibiting the deployment of future type technology. . . . [T]he laser concern was considered and both sides have agreed that they will not deploy future type ABM technology unless the treaty is amended."⁶⁴

These statements are far from unambiguous as regards basing modes and the scope of the prohibition on development and testing. Neither Secretary Rogers nor Ambassador Smith specifically testified that development and testing were prohibited in basing modes other than a fixed, land-based one, which leaves open the possibility that all types of development and testing are permitted short of actual deployment.

⁵⁹ *Strategic Arms Limitation Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Strategic Arms Limitation Agreements*]; *Military Implications*, *supra* note 42.

⁶⁰ U.S. CONST. art. II, §2.

⁶¹ *Strategic Arms Limitation Agreements*, *supra* note 59, at 1.

⁶² *Id.* at 6.

⁶³ *Id.* at 20. In response to questions by Senator Charles Percy regarding potential misunderstandings caused by the Agreed Statements and Common Understandings, Secretary Rogers gave the following answers:

9. Question. . . . What will prevent differing interpretations of these "clauses" [understandings, interpretations, and unilateral statements] from causing a major misunderstanding and hinder[ing] the successful implementation of the agreements?

Answer. These materials were intended to avoid misunderstanding of the underlying agreements and to facilitate successful implementation of such agreements. The clarification provided by these interpretations and statements is believed to far outweigh whatever risk there may be that they, in turn, might become subject to differing interpretations [emphasis in original].

10. Question. Would it be safe to say that these clauses are really another form of safeguard particularly since they deal with such crucial areas as concealment, ABM technology advances, and missile modernization?

Answer. Yes, they do constitute a form of safeguard against misunderstandings in these crucial areas.

Id. at 53.

⁶⁴ *Id.* at 20.

What was the Senate's understanding regarding the development and testing of exotic weapons in a space-based mode under the Treaty? Senator James Buckley, one of two senators who voted *against* the ABM Treaty,⁶⁵ made the following highly instructive remarks before the Foreign Relations Committee during the hearings:

I challenge the morality of precluding the possibility of *developing* at some future date new approaches to antiballistic missile defenses which could offer protection to substantial numbers of our people.

This clause, in Article V of the ABM Treaty, would have the effect, for example[,] of prohibiting the development and testing of a laser-type system based in space The technological possibility has been formally excluded by this agreement.

There is no law of nature that I know of that makes it impossible to create defense systems that would make the prevailing theories obsolete. Why, then, should we by treaty deny ourselves the kind of development that could possibly create a reliable technique for the defense of civilians against ballistic missile attack?⁶⁶

No senator on the committee and no subsequent witness challenged Senator Buckley's analysis.⁶⁷

Senator Buckley's statement not only sheds enormous light on what at least one senator understood the ABM Treaty to prohibit, but also was fully corroborated by Secretary of Defense Melvin Laird. In testimony before the Senate Armed Services Committee on June 6, 1972, Secretary Laird gave the following response to a question from Senator Goldwater regarding advanced technology ABM systems:

With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM treaty which prohibits development of such systems.

There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components.

There are no restrictions on the development of lasers for fixed, land-based ABM systems Space-based ABM systems are prohibited by Article V of the ABM treaty⁶⁸

Thus, in Secretary Laird's view, the development and testing of advanced technology weapons systems in any mode other than a fixed, land-based mode is prohibited by the Treaty. However, basic research, as commonly understood within the arms control community, could proceed in all basing modes.

⁶⁵ Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 3.

⁶⁶ *Strategic Arms Limitation Agreements*, *supra* note 59, at 257-58 (emphasis added).

⁶⁷ *Id. passim*.

⁶⁸ *Military Implications*, *supra* note 42, at 40-41.

Dr. John Foster, Director of Defense Research and Engineering, also appeared before the Senate Armed Services Committee. Dr. Foster underscored that the development and testing of exotic ABM weapons is permitted, but only in conjunction with a fixed, land-based ABM system as envisaged in Article III of the Treaty. In this connection, the following colloquy took place between Senator Henry Jackson and Dr. Foster:

SEN. JACKSON. . . . [I]s there anything in these agreements that impinge[s] on our right to research those areas that bear on both our defense and on defense capability? Specifically, there is a limitation on lasers, as I recall, in the agreement and does the SAL agreement prohibit land-based laser development?

DR. FOSTER. No, sir; it does not. . . . What is affected by the treaty would be the development of laser ABM systems capable of substituting for current ABM components.

*You can develop and test up to the deployment phase of future ABM system components which are fixed and land based.*⁶⁹

In a similar exchange between Senator Margaret Chase Smith and Gerard Smith, it was strongly suggested that developing and testing exotic ABM systems in any mode other than a fixed, land-based one would be prohibited under the ABM Treaty:

SEN. SMITH. Mr. Ambassador, you say that the treaty prohibits the development of other ABM systems. Would this affect a development of a laser ABM system by the United States?

MR. SMITH. . . . [O]ne of the agreed understandings says that if ABM technology is created based on different physical principles, an ABM system or component based on them can only be deployed if the treaty is amended. . . . [D]eployment of systems using those new principles in substitution for radars, launchers or interceptors, would not be permitted unless both parties agree by amending the treaty.⁷⁰

Finally, General Bruce Palmer, Acting Army Chief of Staff, answered the following question posed by Senator Jackson:

SEN. JACKSON. . . . [S]o the [Joint] Chiefs went along with the concept here involved—

GEN'L PALMER. A concept that does not prohibit the development in the fixed, land-based ABM system. We can look at futuristic systems as long as they are fixed and land based.

SEN. JACKSON. I understand.⁷¹

⁶⁹ *Id.* at 274 (emphasis added).

⁷⁰ *Id.* at 295. The same point was made by General W. P. Leber, Safeguard System Manager:

The only limitation in the [ABM] treaty . . . is that either side . . . would not use a laser device to substitute for any other component part of the ABM system. . . . [I]f you propose to substitute, for example, a laser device for the interceptor, that would be prohibited, an amendment to the treaty would be required for deployment.

Id. at 439.

⁷¹ *Id.* at 443.

It was on the basis of this understanding that Senator Jackson, together with an overwhelming majority of his fellow senators,⁷² advised and gave his consent to ratification of the ABM Treaty.

Considering this legislative history as a whole, the Reagan administration's permissive interpretation of the ABM Treaty appears to differ substantially from the consenting Senate's understanding of the Treaty. A fair reading of the Senate hearings strongly suggests two conclusions about the meaning of the ABM Treaty: first, that when Article III, paragraph 1 of Article V and Agreed Statement D are read together, their import is that the development and testing of "Star Wars" technology in any basing mode other than a fixed, land-based mode is prohibited; and, second, that the deployment of such technology in even the fixed, land-based mode is prohibited under the Treaty.

These seemingly divergent views of the ABM Treaty raise two crucial issues: (1) whether the President is free to reach an interpretation of a treaty that varies with the consenting Senate's understanding of that treaty; and (2) if he is not, how such conflicts in treaty interpretation are to be resolved. The following section explores these fundamental constitutional issues.

IV. EXECUTIVE BRANCH-SENATE CONFLICTS OVER TREATY INTERPRETATION

Professor Louis Henkin has observed that "the obligation and authority to implement or enforce a treaty involves also the obligation and authority to interpret what the treaty requires."⁷³ In Henkin's view, the President, as the person who speaks for the United States in international affairs, determines the position of the United States as to the meaning of a treaty vis-à-vis the other parties to the treaty.⁷⁴ Nevertheless, the President's determination is subject to any understanding, reservation or declaration issued by the Senate when it gave its consent to ratification.⁷⁵ In this connection, the words of Justice Story in *The Amiable Isabella* are instructive: "[T]he obligations of a treaty could not be changed or varied, but by the same formalities with which they were introduced; or, at least, by some act of as high an import, and of as unequivocal an authority."⁷⁶

There can be no serious disagreement that in the conduct of foreign affairs the President requires wide latitude. Although this political fact of life has been recognized by the Supreme Court,⁷⁷ the Court has been unresponsive to claims by the executive branch to virtually unlimited powers in

⁷² Christian Sci. Monitor, Oct. 17, 1985, at 36, col. 3.

⁷³ L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 167 (1972).

⁷⁴ *Id.*

⁷⁵ *Id.* Treaty interpretations by the President following Senate consent do not, of course, have the consent of the Senate. *Id.*

⁷⁶ *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 75 (1821).

⁷⁷ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (where the Court noted the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

this field.⁷⁸ Indeed, both Congress and the courts have claimed the independent right to interpret treaties.⁷⁹

The President's interpretation of a treaty may be accorded considerable weight domestically by the other branches of government.⁸⁰ A distinction must be drawn, however, between a treaty interpretation by the executive branch, which may be accorded weight by the courts, and a treaty reinterpretation by the President, which is tantamount to a treaty revision. Treaty interpretation involves defining ambiguous terms and filling in interstices. Absent a reservation or declaration by the consenting Senate, or other clear evidence of the consenting Senate's understanding of a treaty, the President is free to reach reasonable interpretations of a treaty, subject to possible review by an international forum or a domestic court. Reinterpretation or revision, on the other hand, involves making a new, amended version of a treaty. Not only is such a reinterpretation subject to possible review by an international tribunal or a domestic court, but, as a matter of U.S. constitutional law, there can be no interpretation of a treaty different from that which the consenting Senate clearly gave it.⁸¹

Although Agreed Statement D, Article III and Article V of the ABM Treaty may contain ambiguities, the Senate hearings on the ABM Treaty plainly suggest that the Senate's understanding of the Treaty accords with the "restrictive" interpretation of that Treaty regarding the SDI program. The issue is not simply an interpretation of an ambiguous treaty provision by the executive branch, but a rewriting of a treaty by the Executive with neither the advice nor the consent of the Senate. Such an arguably bold reinterpretation of a U.S. treaty obligation by the executive branch is unique.

Where could this issue be resolved? There are at least four forums in which the ABM-SDI controversy could be addressed, two international and two domestic: an international tribunal such as the International Court of Justice; the Standing Consultative Commission created under the ABM Treaty;⁸² the U.S. courts; and the Senate.

⁷⁸ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1951) (Jackson, J., concurring). See also L. HENKIN, *supra* note 73, at 45-65.

⁷⁹ See L. HENKIN, *supra* note 73, at 416 n.128.

⁸⁰ See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).

⁸¹ See L. HENKIN, *supra* note 73, at 167.

⁸² Article XIII of the ABM Treaty provides:

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

- (a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;
- (b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed;
- (c) consider questions involving unintended interference with national technical means of verification;
- (d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;
- (e) agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided by the provisions of this Treaty;

On the international level, while the World Court might be competent to decide questions of treaty interpretation,⁸³ it obviously lacks the authority to decide the domestic constitutional question of the meaning of the ABM Treaty in light of the Senate ratification hearings. More importantly, however, it is improbable in the extreme that the United States would ask the Court to decide whether SDI complies with the ABM Treaty,⁸⁴ considering the recent U.S. experience in the Court concerning U.S. military involvement in Nicaragua,⁸⁵ as well as the national security implications of the SDI program. In addition, the Soviet Union would probably not agree to this method of resolving the dispute. Rather, it seems far more likely that if and when SDI reaches the development and testing phases, the United States either will seek modification of the ABM Treaty to accommodate SDI or will withdraw from the Treaty altogether under Article XV, paragraph 2.⁸⁶

A more promising forum for reconciling the Treaty and the SDI program is the Standing Consultative Commission (SCC), the bilateral U.S.-Soviet review panel established to implement the provisions of the ABM Treaty and the Interim Agreement.⁸⁷ Because misunderstandings can be aired privately in the SCC, it is not only an important confidence-building measure, but also an invaluable forum in which questions of possible treaty violations can be resolved without causing international embarrassment to either side.

Of course, whether the Reagan administration's permissive interpretation

(f) consider, as appropriate, possible proposals for further increasing the viability of this Treaty, including proposals for amendments in accordance with the provisions of this Treaty;

(g) consider, as appropriate, proposals for further measures aimed at limiting strategic arms.

2. The Parties through consultation shall establish, and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

⁸³ Statute of the International Court of Justice, Arts. 35-36, 59 Stat. 1055, TS No. 993, 3 Bevans 1153, 1179.

⁸⁴ On Oct. 9, 1985, the State Department announced that the United States had terminated its Declaration of Aug. 26, 1946, submitting to the compulsory jurisdiction of the International Court of Justice. See Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

⁸⁵ See *id.*

⁸⁶ Article XV, paragraph 2 of the ABM Treaty provides:

Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

ABM Treaty, *supra* note 1, 23 UST at 3446.

⁸⁷ See *supra* notes 23 and 82. For a discussion of the many disputes that the Standing Consultative Commission has been called upon to resolve, see T. WOLFE, *supra* note 19, at 35-37; S. TALBOTT, *supra* note 21, at 116, 143-44, 197-98; S. TALBOTT, *supra* note 7, at 320.

of the Treaty comports with the Senate's understanding can only be settled indirectly by the SCC. From the perspective of crisis stability, however, the SCC represents the most promising forum for resolving the SDI-ABM controversy between the two superpowers. It is a forum in which the military, intelligence and diplomatic communities from both sides can meet, exchange information and share concerns over developments affecting the Treaty. The SCC has proven invaluable in the past and should be seriously considered as a mechanism for resolving the SDI controversy through quiet diplomacy. Although the SCC had held regular biannual sessions lasting 4 to 6 weeks since shortly after its inception in 1972,⁸⁸ that routine regrettably broke down soon after the Soviet Union terminated the Intermediate-Range Nuclear Force talks in Geneva in 1983.⁸⁹

Of the domestic forums in which the ABM-SDI controversy could be resolved, the courts immediately suggest themselves. The Supreme Court has had several occasions to consider the treaty-making power under Article II, section 2 of the Constitution.⁹⁰ It has not, however, considered the precise issue of an executive branch interpretation of a treaty being at odds with the consenting Senate's understanding of the treaty. The closest the Supreme Court has come to addressing this issue was in *Goldwater v. Carter*.⁹¹

In that case, the Court considered and rejected a claim that the Constitution requires a two-thirds vote of the Senate before the President may terminate a treaty. Nine senators and 16 members of the House of Representatives sought declaratory and injunctive relief against President Carter⁹² following his announcement that the defense treaty between the United States and the Republic of China would be terminated.⁹³ A sharply divided Court vacated the judgment of the court of appeals and remanded the case with directions to dismiss the complaint.⁹⁴ Several Justices filed opinions stating their separate views.

Justice Powell would have dismissed the congressional complaint as not ripe for judicial review.⁹⁵ In his view, until such time as the President and Congress reach a "constitutional impasse," the judicial branch should not decide issues affecting the allocation of power between Congress and the President.⁹⁶ "Otherwise," Justice Powell continued, "we would encourage

⁸⁸ T. WOLFE, *supra* note 19, at 36.

⁸⁹ S. TALBOTT, *supra* note 21, at 3-4.

⁹⁰ See, e.g., *Reid v. Covert*, 354 U.S. 1, 16 (1957); *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 360 (1816).

⁹¹ 444 U.S. 996 (1979). See Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U.L. REV. 577 (1980-81); Note, *Executive Action, Goldwater v. Carter, and the Allocation of Treaty Termination Power*, 15 GA. L. REV. 176 (1980-81); Note, *Unilateral Presidential Treaty Termination Power by Default: An Analysis of Goldwater v. Carter*, 15 TEX. INT'L L.J. 317 (1980); Note, *The Constitutional Twilight Zone of Treaty Termination: Goldwater v. Carter*, 20 VA. J. INT'L L. 147 (1979-80).

⁹² See *Goldwater v. Carter*, 481 F.Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

⁹³ Mutual Defense Treaty between the United States of America and the Republic of China, Dec. 2, 1954, 6 UST 433, TIAS No. 3178, 248 UNTS 213 (entered into force Mar. 3, 1955).

⁹⁴ 444 U.S. 996.

⁹⁵ *Id.* at 997 (Powell, J., concurring).

⁹⁶ *Id.*

small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict."⁹⁷ Since Congress as a body had not taken any official action rejecting President Carter's claim of unilateral power to terminate the treaty, Justice Powell did not believe it was the Court's task to do so.⁹⁸

Justice Rehnquist, joined by three other Justices,⁹⁹ concluded that the case presented a nonjusticiable political question.¹⁰⁰ As set forth in *Baker v. Carr*, the political question doctrine incorporates three inquiries.¹⁰¹ The first is whether the text of the Constitution commits resolution of the issue to one of the coordinate branches of government. The second is whether resolution of the issue would require a court to move beyond areas of judicial expertise. The third is whether prudence counsels against judicial intervention.¹⁰²

In his opinion, Justice Rehnquist wrote that the basic question presented was a political one and therefore nonjusticiable.¹⁰³ That question, Justice Rehnquist stated, "involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."¹⁰⁴ As a practical matter, Justice Rehnquist added, Congress has resources at its disposal to protect and assert its interests, such as the power to regulate foreign commerce, to raise armies and to declare war.¹⁰⁵

In a dissenting opinion,¹⁰⁶ Justice Brennan would have affirmed the decision of the court of appeals on the ground that treaty termination in this instance was tantamount to withdrawing recognition from a foreign government, a power committed by the Constitution to the President alone.¹⁰⁷

Goldwater v. Carter raises a host of questions about alleged treaty reinterpretation by the President and whether the judiciary may intervene in such a case. First, is the President required to consult the Senate in matters of treaty interpretation? If he is but fails to do so, can he be compelled to do so by the judiciary? Must the Senate, if it is not the same Senate that approved the particular treaty, reach an impasse with the President before the judiciary will intervene? Does a member of the Senate have standing to challenge the Executive's interpretation of a treaty? Are questions of treaty interpretation by the President essentially political in nature and therefore nonjusticiable?

On its face, the question of the meaning of a treaty—the supreme law of the land¹⁰⁸—is perfectly suited for judicial resolution. Federal judicial power encompasses cases involving treaties made under the authority of the federal

⁹⁷ *Id.*

⁹⁸ *Id.* at 998.

⁹⁹ Justice Rehnquist wrote a separate opinion in which Chief Justice Burger, Justice Stevens and Justice Stewart joined. *Id.* at 1002.

¹⁰⁰ *Id.* (Rehnquist, J., concurring).

¹⁰¹ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁰² *Id.* Had the case been ripe for review, Justice Powell would have answered all three questions in the negative. 444 U.S. at 998–1001.

¹⁰³ 444 U.S. at 1002 (Rehnquist, J., concurring).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1004 & n.1.

¹⁰⁶ *Id.* at 1006 (Brennan, J., dissenting).

¹⁰⁷ *Id.* at 1007.

¹⁰⁸ U.S. CONST. art. VI.

Government.¹⁰⁹ Since 1803, when Chief Justice John Marshall first announced the doctrine in the landmark decision of *Marbury v. Madison*,¹¹⁰ judicial review—the power of the courts to determine the validity of acts of the other branches of government—has been a fixed star in American jurisprudence.¹¹¹ As noted by Justice Powell in *Goldwater*, the duty of the Supreme Court is to say what the law is.¹¹² While every treaty by definition necessarily touches upon the conduct of foreign relations, a sphere traditionally reserved for the political branches of government, the Court in *Baker v. Carr* explicitly rejected the contention that anything touching upon foreign affairs is immune from judicial review.¹¹³ As far back as 1899, the Supreme Court stated that the construction of treaties "is the peculiar province of the judiciary,"¹¹⁴ not of Congress or the executive branch.

Given that the courts are not excluded from treaty interpretation, does the SDI-ABM controversy nevertheless present a nonjusticiable political question? Turning to an analysis of the three-pronged test in *Baker v. Carr*, we must first ask whether the Constitution commits treaty interpretation to one particular branch of government.¹¹⁵ While no constitutional provision explicitly confers the power to interpret treaties upon the President, neither does any provision of the Constitution confer such power exclusively on the Senate. Article II, section 2 of the Constitution does authorize the President to make treaties, but only with the advice and consent of the Senate, which supports the view that the power to interpret treaties is the President's in the first instance, but is subject to any declaration on, reservation to or understanding of the treaty by the consenting Senate.

Should the President be required, then, to consult with the Senate on such questions? Arguably, he should. But for the Senate's approval, no treaty would ever take domestic legal effect in the first place.¹¹⁶ However, as is discussed below,¹¹⁷ there appears to be no constitutional requirement that the President consult with the Senate on matters of treaty interpretation. That conclusion, of course, does not mean that the President has an unfettered hand in such matters.

¹⁰⁹ U.S. CONST. art. III, §2, cl. 1.

¹¹⁰ 5 U.S. (1 Cranch) 137 (1803).

¹¹¹ See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1; Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955); Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914).

¹¹² 444 U.S. at 1001.

¹¹³ 369 U.S. at 211 ("it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

¹¹⁴ *Jones v. Meehan*, 175 U.S. 1, 75 (1899). Compare *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933) ("the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight").

¹¹⁵ See *supra* notes 101–102 and accompanying text.

¹¹⁶ However, an interpretation of a treaty that would be tantamount to a termination of that treaty would raise a question quite similar to the one presented in *Goldwater v. Carter*. See *supra* notes 90–107 and accompanying text. But see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

¹¹⁷ See *infra* notes 147–150 and accompanying text.

As for the second prong of the *Baker v. Carr* test, would resolution of this issue require a federal court to move beyond areas of its expertise?¹¹⁸ While the arms control field is fraught with jargon, often unintelligible to the lay public,¹¹⁹ the courts are frequently called upon to interpret highly complex laws.¹²⁰ In connection with the ABM Treaty, the task that the judiciary would be called upon to perform would be closely analogous to a "garden variety" problem of statutory interpretation, requiring no "special competence or information."¹²¹ More importantly, the interpretation of a treaty should not present an inherently daunting task for the federal courts; it is one that they perform regularly.¹²²

If the first two prongs of the three-pronged test of *Baker v. Carr* can be met—that treaty interpretation is not committed to one of the other coordinate branches and that resolution of the issue would not require the courts to move into an area beyond judicial expertise¹²³—does prudence counsel against judicial intervention? A ruling by the Court that the President has not misinterpreted the ABM Treaty in light of the Senate hearings would obviously not cause any embarrassment to the President, although such a conclusion would certainly be unpalatable to any senator who had brought suit. On the other hand, while the President may have the responsibility for carrying out treaty obligations, and the incidental responsibility for interpreting those obligations, that does not mean that the President has the power to rewrite treaty provisions. If the Court entertained a lawsuit brought by members of the Senate challenging the President's interpretation of the ABM Treaty, the conclusion that certain SDI development and testing is illegal under the ABM Treaty—contrary to the opinion of the administration—while vindicating the Senate, would be a source of embarrassment to the President, internationally and domestically.

Nevertheless, these consequences are all a question of degree. Considering the serious constitutional issue implicated when the executive branch's interpretation of a treaty is at odds with the consenting Senate's understanding of that treaty, any attendant embarrassment to the Executive pales in comparison. Such a setback would arguably be no more embarrassing to the executive branch than other major setbacks that Presidents have met with

¹¹⁸ See *supra* notes 101–102 and accompanying text.

¹¹⁹ See *Goldwater v. Carter*, 444 U.S. at 1000 (Powell, J., concurring) (if "an inquiry demands . . . special competence or information beyond the reach of the Judiciary," then it is one best left for another branch).

¹²⁰ Examples include patent cases (see, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303 (1980)), antitrust cases (see, e.g., *Catalano, Inc. v. Target Sales*, 446 U.S. 643 (1980)) and securities cases (see, e.g., *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973)).

¹²¹ *Goldwater*, 444 U.S. at 1000 (Powell, J., concurring).

¹²² See, e.g., *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) (interpretation of the Treaty of Friendship, Commerce, and Navigation with Japan); *American Ass'n of Exporters & Importers—Textile & Apparel Group v. United States*, 751 F.2d 1239 (Fed. Cir. 1985) (interpretation of the Multifiber Arrangement); *Mast Industries, Inc. v. Regan*, 596 F.Supp. 1567 (Ct. Int'l Trade 1984) (interpretation of the Multifiber Arrangement).

¹²³ *Baker v. Carr*, 369 U.S. at 217. See *supra* notes 116–121 and accompanying text.

in the courts in the past.¹²⁴ Moreover, it should come as no surprise to the President that his treaty interpretation, if tantamount to a treaty reinterpretation in light of the consenting Senate's understanding of the treaty, would run the risk of being invalidated by a reviewing court. In short, prudence does not clearly counsel against judicial intervention in the SDI-ABM controversy.

Assuming that a political question is not presented by this particular treaty interpretation,¹²⁵ would the Senate have to pass a resolution rejecting the Reagan administration's permissive interpretation of the ABM Treaty, and thus directly confront the executive branch, before the judiciary would deem the matter ripe for review? Arguably, the answer to this question is no. As is noted below,¹²⁶ the ABM Treaty ought to be interpreted in light of the legislative history of the Senate that approved it, not in light of the views of a subsequent Senate. A useful analogy can be found in statutory interpretation. The Supreme Court has stated that the views of a subsequent Congress as to the meaning of a given statute cannot override the unmistakable intent of the enacting one; it is the intent of the enacting Congress that controls.¹²⁷ As shown in the foregoing discussion, the record of the Senate hearings leaves little doubt that the Senate thought it was consenting to a specific reading of the Treaty. In short, the views of the approving Senate should be equally binding on the current President, the current Senate and the courts. No official act by the current Senate designed to create a constitutional impasse should be required for the matter to be considered ripe for judicial review, since the views of that body have no legally binding effect regarding the meaning of a provision of the ABM Treaty.

If a group of senators did file a lawsuit against President Reagan seeking a declaration of the meaning of the ABM Treaty vis-à-vis SDI, would those senators have standing to bring such an action?¹²⁸ Over the years, several congressional-plaintiff lawsuits have been filed against the executive branch, challenging alleged executive encroachment on the constitutional prerog-

¹²⁴ See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974).

¹²⁵ Considering the penchant of the judiciary for invoking the political question doctrine to avoid exercising its jurisdiction in cases involving national defense, it is perhaps unrealistic to believe that a legal challenge by the Senate in this connection would succeed.

Nevertheless, the Reagan administration's revised interpretation of the ABM Treaty is quite arguably not a "political question." See *Baker v. Carr*, 369 U.S. at 212 ("if there has been no conclusive 'governmental action' then a court can construe a treaty and may find it provides the answer"). When compared to the Carter administration's decision to terminate the defense treaty with Taiwan in order to normalize relations with the People's Republic of China—a paradigm of a political decision—a treaty interpretation that certain weapons systems may be developed and tested pursuant to the ABM Treaty has fewer political overtones.

¹²⁶ See *infra* notes 147–150 and accompanying text.

¹²⁷ *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977). The Court has in fact given the views of a subsequent Congress some weight generally only when the precise intent of the enacting Congress was obscure. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

¹²⁸ Private citizens would clearly be unable to bring such an action because the ABM Treaty is not self-executing. See *Diggs v. Richardson*, 555 F.2d 848, 850–51 (D.C. Cir. 1976).

atives of Congress.¹²⁹ These cases have not always been ringing successes for the members of Congress who have brought them, having often been dismissed for lack of standing¹³⁰ or on the ground that such actions present a nonjusticiable political question.¹³¹ It seems doubtful that in their capacity as private citizens, senators would not have standing.¹³² While the Supreme Court has not definitively ruled on the question,¹³³ lower federal courts have split on the issue; in some instances, they have found standing for members of Congress,¹³⁴ but in others they have failed to find it.¹³⁵

Arguably, however, members of the Senate *qua* senators should have standing to bring an action challenging the President's interpretation of a treaty.¹³⁶ The nature of their complaint would be that the Executive's interpretation, being at odds with the consenting Senate's understanding of that treaty, so seriously erodes the Senate's constitutional advise-and-consent role as to render it void.¹³⁷ If the focus is on whether the President's interpretation of the ABM Treaty is consistent with that of the Senate that approved it, then institutional action by the current Senate should not be a precondition to ripeness.¹³⁸ Moreover, regarding standing, any senator *qua* senator ought to have standing to bring an action to resolve such a serious

¹²⁹ See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979); *Holtzman v. Schlesinger*, 414 U.S. 1304 (Marshall, Circuit Justice 1973); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). See generally McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977).

¹³⁰ See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973) (Congresswoman Holtzman did not have standing *qua* member of Congress to attack the constitutionality of the Vietnam War). But see *Kennedy v. Sampson*, 511 F.2d 430, 435-36 (D.C. Cir. 1974) (Senator Kennedy had standing to seek declaratory judgment that presidential pocket veto of a bill was ineffective). See generally Note, *Congressional Standing to Challenge Executive Action*, 122 U. PA. L. REV. 1366 (1974).

¹³¹ See, e.g., *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring). But see *Baker v. Carr*, 369 U.S. at 211 (rejecting idea that anything touching foreign affairs is immune from judicial review). See generally Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982). For an excellent overview of the case law dealing with the political question doctrine, see *Atlee v. Laird*, 347 F.Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

¹³² See *supra* notes 128 and 130.

¹³³ The issue of standing by members of Congress as such was raised in the district court but not reached by the Supreme Court in *Mink v. EPA*, 410 U.S. 73, 75 n.2 (1973).

¹³⁴ See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 435-36 (D.C. Cir. 1974).

¹³⁵ See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973).

¹³⁶ See generally Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665 (1974); Note, *supra* note 130.

¹³⁷ Compare *Kennedy v. Sampson*, 511 F.2d at 435-36 (Senator Kennedy had standing to challenge the validity of a presidential pocket veto on the ground that it deprived him "of the effectiveness of his vote" in favor of the bill), with *Goldwater v. Carter*, 617 F.2d 697, 714-15 (D.C. Cir.) (Senator Goldwater lacked standing to challenge treaty termination by the President absent legislative action in conflict with the Executive), *vacated*, 444 U.S. 996 (1979); and *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (members of Congress have no judicially enforceable rights under treaty that is not self-executing).

¹³⁸ Still, under Justice Powell's view of ripeness as stated in *Goldwater*, a Senate resolution challenging the President's interpretation might still be a necessary precondition to any such action. 444 U.S. at 996-1002.

constitutional question, which trenches so heavily upon the Senate's role in treaty making.¹³⁹ If any complaining senators happen also to have voted on the ABM Treaty itself, a further argument could be made that they have been denied their vote under Article II, section 2 of the Constitution, which would confer standing upon them to challenge the President's permissive interpretation of the ABM Treaty.¹⁴⁰

Besides the question whether SDI development and testing is permitted under the ABM Treaty, major domestic environmental concerns are potentially implicated if huge outlays of federal funds are expended on such weapons development.¹⁴¹ National defense can be a supremely domestic concern in this connection,¹⁴² only incidentally touching upon foreign affairs.¹⁴³ Thus, in addition to legal action by members of the Senate challenging the President's latest interpretation of the ABM Treaty, a lawsuit could conceivably be brought by private citizens challenging the SDI program once it enters the development and testing phases.

For example, a challenge could be made that such development and testing contravenes the National Environmental Policy Act (NEPA), which bans federally funded projects that have a potentially adverse effect on the environment unless an environmental impact statement is first prepared and published for public comment.¹⁴⁴ It is not entirely inconceivable that in the course of such litigation a court would be presented with an opportunity to consider whether the administration's permissive interpretation of the Treaty is consistent with the consenting Senate's understanding, particularly if the

¹³⁹ See *Kennedy v. Sampson*, 511 F.2d at 434, where the court noted in a related context:

The provision under discussion [Art. I, §7 of the Constitution] allocates to the executive and legislative branches their respective roles in the law-making process. When either branch perceives an intrusion upon its legislative power by the other, this clause is appropriately invoked. The gist of appellee's complaint is that such an intrusion has occurred as a result of the President's misinterpretation of this clause

¹⁴⁰ See *Kennedy v. Sampson*, 511 F.2d at 434; compare *Holtzman v. Schlesinger*, 484 F.2d at 1315.

¹⁴¹ See Guertner, *supra* note 4, at 74 (\$26 billion for SDI research through fiscal year 1989); *Will Reagan's Star Wars Plan Fly?*, Miami Herald, Nov. 6, 1985, at 2E, cols. 1-4 ("SDI officials say an informal decision about whether these problems can be solved can be made by the early 1990s, after research costing some \$30 billion").

¹⁴² See, e.g., *Jackson County v. Jones*, 571 F.2d 1004, 1007 (3d Cir. 1978) (Department of Defense not excepted from the requirements of the National Environmental Policy Act); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1976).

¹⁴³ See, e.g., *Youngstown*, 343 U.S. at 587 (rejecting notion that President has inherent power as commander-in-chief to seize domestic steel mills as part of the Korean War effort).

¹⁴⁴ 42 U.S.C. §§4331-4335 (1982). See *supra* note 142 and cases cited therein. But see *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) (national security exception to NEPA allows Department of the Navy to keep secret whether it stores nuclear weapons in Honolulu). Since the ABM Treaty is not self-executing, it is doubtful that a direct challenge could be made by a private citizen to the President's permissive interpretation of the Treaty. Compare *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976).

court finds an apparent conflict between that interpretation and NEPA.¹⁴⁵ If the court also finds that SDI development and testing run afoul of NEPA, it could resolve the conflict by concluding that such SDI programs are in violation of the consenting Senate's understanding of the Treaty, thus construing the Treaty and NEPA so as to give effect to both.¹⁴⁶ Nevertheless, the prospects for success of a court challenge to the SDI program by private individuals do not appear to be bright.

A fourth forum in which the question of treaty interpretation could be resolved is the Senate itself. As a threshold question, is the President obligated to consult with the Senate on a matter of treaty interpretation? Considering that the President is responsible under his foreign affairs powers for carrying out treaty obligations,¹⁴⁷ the President ordinarily would appear to have no constitutional duty to consult with the Senate on such matters—although failure to do so could be political suicide. Moreover, even if the Senate involved happened to be the Senate that gave its consent to the particular treaty, the answer would still appear to be no. Nearly 85 years ago the Supreme Court considered the legal effect of a Senate resolution purporting to interpret a treaty between Spain and the United States that ceded the Philippines to the United States.¹⁴⁸ The Senate resolution was adopted by a majority of those senators present and voting.¹⁴⁹ The Court held that in any event, despite the lack of a two-thirds majority, "[t]he meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."¹⁵⁰

Although the President may thus have no constitutional duty to consult with the Senate on a matter of treaty interpretation, the Senate has the power to compel such consultation if it can muster the political will to challenge the President by threatening to or actually withholding defense appropriations for SDI research. As Justice Rehnquist suggested in *Goldwater v. Carter*,¹⁵¹ the power of the purse can be a potent weapon in the area of treaty interpretation.

V. CONCLUSION

A serious constitutional question is posed by a treaty interpretation of the executive branch that appears to be fundamentally at odds with that of the consenting Senate. If the Senate's advise-and-consent role is to be meaningful and not a mere formality to treaty making, the advise-and-consent clause must have teeth. It would do violence to that clause to say that the executive branch may present a treaty for approval by the Senate, tell the

¹⁴⁵ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("the courts will always endeavor to construe them [a treaty and legislation] so as to give effect to both, if that can be done without violating the language of either").

¹⁴⁶ *Id.*

¹⁴⁷ L. HENKIN, *supra* note 73, at 164.

¹⁴⁸ *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1899).

¹⁴⁹ *Id.* at 180.

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 105 and accompanying text.

Senate that it has a specific meaning, and then turn around after the Senate has given its consent and say that the treaty now means something entirely different. To so conclude would make a mockery of the Senate's role in treaty making.

As the foregoing has shown, the President is bound by what the consenting Senate's understanding of a particular treaty was at the time it gave its consent to ratification. The President is not free to advance a contrary interpretation, in either an international or a domestic forum. Conversely, if the consenting Senate expressed no particular understanding of a treaty provision, or if it passed no reservations or declarations respecting a treaty, the President should have wide latitude, within the bounds of reason, to interpret that treaty. If the Senate's consent was unconditional, a subsequent Senate cannot add its own gloss on a given treaty.

In a case where the consenting Senate clearly expressed its understanding as to the meaning of a treaty at the time it gave its consent to ratification, the difficulties of forcing conformance by the executive branch to that understanding are formidable. In the final analysis, indirect resolution of the controversy over SDI and the ABM Treaty by an international forum such as the World Court is impractical, absent willingness on the part of the executive branch to submit to an international tribunal's jurisdiction and to abide by its determination. The same holds true for indirect resolution of this controversy in a bilateral forum such as the SCC, unless the executive branch shows some willingness to make concessions. Moreover, whereas the interpretative conflict between the Senate and the executive branch could be directly addressed in federal court, considering the genuine obstacles posed by the political question doctrine, the doctrine of ripeness and the doctrine of standing, the prospects for resolving this issue in a domestic judicial forum also appear dim, though not as futile as in the international forums.

The one forum that does hold out the prospect of a satisfactory resolution of the SDI-ABM question is the Senate itself. For there the question of an executive branch treaty interpretation at variance with the consenting Senate's understanding can be brought to the fore through the Senate's control over defense appropriations.¹⁵² However, the power of the purse will only represent a marginally more attractive alternative to litigation unless the Senate dares to resist the President by withholding funds for SDI research. While threats to withhold funds arguably are a more effective vehicle for Congress to shape the contours of national defense policy, in a world of pluralistic politics consensus is at a premium. In the end, however, the Senate may amount to little more than a highly visible forum where debate on the meaning of the ABM Treaty can be aired and conflicting opinions on that question weighed.

¹⁵² U.S. CONST. art. I, §9, cl. 7.

PHILIP JESSUP'S LIFE AND IDEAS

*By Oscar Schachter**

Philip Jessup's life was richly varied. Scholar, practitioner, teacher, administrator, diplomat, judge, prolific writer—he moved from role to role, displaying in each his abundant gifts of character and intellect. Every new job, each fresh subject was a challenge met with zest and high spirits. As a scholar, he was drawn to the issues of the day. He never hesitated to take sides when he felt he had good grounds to do so. In his classes and writings, he was as concerned with practical action as with new ideas. Endowed with a commanding presence, a remarkably resonant voice and a talent for lucid and lively expression, Jessup had no difficulty in getting the attention of an audience. He used concepts sparingly, but effectively, and he avoided windy rhetoric. On the whole, he favored narrative exposition, particularly highlighting the aims and predicaments of the individual actors. People, it seems clear, were more real to him than the abstractions of law or political theory. He was a stickler for thorough and detailed research, as his judicial opinions and books show. Concrete, unique facts were important to him; he had to get them right. Historical detail and revealing quotations were used by him with telling effect.

His diplomatic and administrative roles revealed his versatility and practical judgment. He was exhilarated by the drama of international debate and negotiation. Even tedious meetings did not quench his spirit. "His wit, gay and ready, and his irrepressible humor would survive the longest and dullest meetings"; so wrote Dean Acheson,¹ the Secretary of State under whom Jessup served. Happily, Jessup had a sharp eye for the comic and absurd. It helped him cope with the less admirable traits of bureaucrats and long-winded delegates. But underlying his wit were deep feelings of concern for the many victims of conflict, mistrust and sheer stupidity. Time and time again, Jessup gave vent to his anger and contempt. On these occasions, he was neither the cautious diplomat nor the objective scholar *au dessus de la mêlée*.

Jessup's humanity was evident in his personal relations. It was manifest in his many friendships and in the warmth and empathy that reached out to colleagues and students, even at times to adversaries. He relished good stories and lively conversation. He took pleasure in helping those in need or whose merit was not yet known. Many a former student owes his or her start to Jessup's efforts. He maintained an interest in their careers and, almost

* Of the Board of Editors.

¹ Acheson, *Philip C. Jessup: Diplomatist in Transnational Law*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP* 3, 6 (W. Friedmann, L. Henkin & O. Lissitzyn eds. 1972).

to the very end, wrote to them when he read articles or learned of their new positions. One can readily see why he was held in such esteem and affection. His heroism in the Brazilian jungles on behalf of people he barely knew, was of a piece with his character.² He was truly a man for all seasons.

PROFESSOR AND DIPLOMAT

Despite his varied career and interests, the center of gravity in Jessup's professional life, from its very beginnings, was a dedication to international law. It was not surprising that he chose law. His father, Henry W. Jessup, had been a distinguished New York practitioner and the author of authoritative works on estate law. A great-grandfather had been a judge and chairman of the Platform Committee of the Republican Party convention in 1860 that nominated Abraham Lincoln.³ Philip Jessup would surely have made his mark as a leading member of the bar if he had not been moved at a fairly early age to opt for international law.

The story is worth recalling. Interrupting his college education in 1917, he enlisted in the army and as a machine gunner saw action in Belgium and France. He returned to Hamilton College as a senior,⁴ with a strong desire to take part in efforts to end all wars. It was his good fortune that, at the time, Elihu Root was a scholar in residence at the college. Root, a former Secretary of State and Secretary of War, was a leader of the American bar. (He was the first President of the American Society of International Law, continuing as President of the Society until 1924.) Root stirred Jessup's interest in international law. He saw to it that Jessup met James Brown Scott, then editor in chief of the *American Journal of International Law*, and like Root a fervent advocate of international arbitration and judicial settlement. Jessup also consulted John Bassett Moore, the Hamilton Fish Professor of International Law at Columbia University, a scholar and later a judge on the Permanent Court of International Justice. Thus, even prior to entering Columbia Law School, Jessup had come to know three leading American international lawyers. The three shared the optimistic belief that international society was evolving to a stage in which law and, particularly, judicial institutions would have the principal role in preventing conflicts between nations.⁵ Their evolutionary optimism deeply influenced Jessup.

² See Philip Jessup, Jr.'s reminiscences, *infra* at p. 909.

³ See statement of Jessup in *The Nomination of Philip Jessup: Hearings Before the Subcomm. on Nominations of the Senate Comm. on Foreign Relations*, 82d Cong., 1st Sess. 162-63 (1951) [hereinafter cited as *Hearings*]. The hearings on Jessup's nomination as a U.S. representative to the United Nations contain much detailed biographical information. In addition to his own submissions, they include reprints of articles on him as well as many letters. See *Hearings* at 155-302, 443-634, 890-945. Many of the details on Jessup's career in this article have been taken from these materials.

⁴ Senator Irving Ives, a classmate at Hamilton College, described Jessup as the outstanding man in the college at the time, recalling that he was the leading actor, captain of the track team, No. 1 debater, Rhodes Scholar-elect and "dater of the best looking girls." Ives was quoted in an article on Jessup by Davidson, *infra* note 7. See *Hearings*, *supra* note 3, at 672.

⁵ On Root's life and views, see P. JESSUP, ELIHU ROOT (1938).

At Columbia Law, Jessup studied international law with both Moore and Edwin Borchard, who was a scholar and a practicing lawyer specializing in international claims. Jessup produced his first published paper when a second-year student; it was a note for the *Columbia Law Review* on maritime jurisdiction affecting "rumrunners," the smugglers of alcoholic liquor during the period of Prohibition. That note led him later to select the law of territorial waters as the topic for a Ph.D. dissertation at Columbia and to a continued interest in the law of the sea. After receiving a law degree in 1924 from Yale (to which he had transferred in his third year), Jessup became an assistant to the solicitor of the State Department, Charles Cheney Hyde. He did not lack for impressive recommendations. One was from the Chief Justice, ex-President William Howard Taft; another was from Harlan F. Stone, Columbia Dean of Law and later Chief Justice.⁶

Jessup began his career as a scholar and teacher at Columbia in 1925. Concurrently with his teaching and research for his doctorate, he practiced with a New York law firm, an association that continued until 1943 though actual practice was sporadic. Jessup's first book, a 548-page volume based on his doctoral dissertation, appeared in 1927; it was entitled *The Law of Territorial Waters and Maritime Jurisdiction*. Jessup later commented that the book sold surprisingly well because rumrunners and bootleggers wanted authoritative guidance for their activities.⁷

He was unusually productive for a young scholar and practicing lawyer. Within 4 years, four scholarly books by him appeared. In addition to the book on maritime jurisdiction, he produced a book entitled *American Neutrality and International Police* (1928), another in French, *L'Exploitation des richesses de la mer* (Paris 1929), and the third, *The United States and the World Court* (1929). The book on ocean resources was based on Hague Academy lectures (then required to be rendered in French). (The invitation to give the Hague Academy lectures was an unusual distinction then for one only 32 years old.) The study on the Court reflected his experience in 1929 when he served as an assistant to Elihu Root at a conference of jurists in Geneva on the revision of the Statute of the Permanent Court of International Justice. These early books expressed interests that remained important to him throughout his life.

In 1930 he took a year's leave from Columbia to serve as legal adviser to the American Ambassador in Cuba, Harry Guggenheim. This was the first of several leaves of absence that enabled him to learn much about the practical side of diplomacy and international relations. During the 1930s, the rise of Hitler, the Spanish Civil War and the threat of general war in Europe had

⁶ These facts are in Jessup's statements to the Senate subcommittee, *Hearings*, *supra* note 3.

⁷ See Davidson, *The Surprising Mr. Jessup*, COLLIER'S, July 30, 1949, reprinted in *Hearings*, *supra* note 3, at 668, 672. Davidson reports that Jessup's treatise was known as "The Bootleggers' Guide." He relates that a rumrunner, Bill McCoy (known as "the Real McCoy"), threatened a libel suit because Jessup had held him up to ridicule by saying the Coast Guard had captured him, whereas in fact he had "captured the Coast Guard" (that is, when the Coast Guard officers had boarded his vessel, he made off with them). When Jessup wrote a correction for the newspapers, McCoy dropped the action and gave Jessup his picture dedicated to "a Square Shooter."

aroused much interest in neutrality and collective security. Jessup devoted his major scholarly work to neutrality, producing, with Francis Deák as coauthor, *Neutrality: Its History, Economics and Law*,⁸ as well as a collection of treaty provisions defining neutral rights and duties⁹ and a two-volume collection of neutrality laws and regulations.¹⁰ A separate book on collective security was also published in 1935.¹¹ Jessup favored neutrality as generally in the interest of the United States, a position that drew him into the America First movement opposed to U.S. involvement in the European war.

Jessup's admiration for Elihu Root led him to devote some years to producing a two-volume biography of Root.¹² This gave Jessup an opportunity to study the practical conduct of foreign affairs in the United States and it enabled him to see both the strength and the limits of the conservative internationalist positions espoused by Root.

At Columbia, Jessup was not only on the law school faculty but also an active member of the Department of Public Law and Government (later renamed Department of Political Science). In that capacity, he was involved in dissertations and discussions of international politics, diplomatic history and national security, broadening his knowledge and perspectives. Reciprocally, the political scientists, old and young, were helped by him to understand the role of international law in the world political system.¹³ This linkage is much less common today than formerly and it is perhaps one reason that political scientists are for the most part more ignorant and disdainful of international law than their predecessors. Jessup's example (like that of Quincy Wright and Herbert Briggs) shows that international law and political science could benefit from more collaboration within and outside of universities.

In the late 1930s, war and threats of war in Europe and the Far East brought Jessup into a more active political role. He took a leading part in the Institute of Pacific Relations, a nonofficial international body for cooperative studies of Far Eastern problems, and also in its American affiliate, the American Institute of Pacific Relations. In 1939 he was elected chairman of both bodies, succeeding Newton D. Baker, a former Secretary of War. Although these bodies were primarily research and study organizations, they became targets of Senator McCarthy's attacks in 1950 and 1951, based on the allegation that prominent persons in the organizations were Communist or "pro-Communist." McCarthy's charges against Jessup—to which I will revert below—included a strong indictment of his role in the IPR.

⁸ Volume I was written by Jessup and Deák and volume IV by Jessup alone. The other two volumes were written by others under the editorial guidance of Jessup and Deák.

⁹ TREATY PROVISIONS DEFINING NEUTRAL RIGHTS AND DUTIES, 1778-1936 (P. Jessup & F. Deák eds. 1937).

¹⁰ A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES, 2 vols. (P. Jessup & F. Deák eds. 1939).

¹¹ P. JESSUP, THE UNITED STATES AND THE STABILIZATION OF PEACE: A STUDY OF COLLECTIVE SECURITY (1935).

¹² See note 5 *supra*.

¹³ See Fox, Philip C. Jessup, *Scholar of International Politics*, 24 COLUM. J. TRANSNAT'L L., at xv (1986).

Jessup's political activity in the late 1930s included his advocacy of strict U.S. neutrality in foreign wars. He favored a hands-off policy in the Spanish Civil War and he opposed sending arms or other aid to Great Britain as unneutral.¹⁴ In early 1941, he became a member of the America First Committee and stayed with it until Pearl Harbor. That body, composed in the main of "noninterventionists" who were mostly conservative in their politics, also included several well-known liberal isolationists. Jessup expressed himself strongly against intervention until the Japanese attack occurred. Many leading American international lawyers took a similar position (Quincy Wright and Abraham Feller were notable exceptions).

After the United States entered the war, Jessup became Associate Director of the Naval School of Military Government and Administration at Columbia University and a lecturer at the similar army school located in Charlottesville, Virginia (of which Hardy Dillard was director). In 1943 Herbert Lehman named him chief of training and personnel in the Office for Foreign Relief and Rehabilitation, a State Department agency later absorbed into the United Nations Relief and Rehabilitation Administration (UNRRA). Jessup acted as an assistant secretary at the first conference of UNRRA in 1943 and in a similar capacity at the Bretton Woods Conference, which established the International Monetary Fund and World Bank. In these conferences, he impressed Dean Acheson with his diplomatic skill, good judgment and infectious sense of humor.¹⁵

Jessup returned to international law in 1945 by assisting the Legal Adviser of the State Department, Green Hackworth, and the Solicitor General of the United States, Charles Fahy, in preparing a preliminary draft of the Statute of the International Court of Justice. Later that year, he was an adviser to the U.S. delegation at the San Francisco Conference on the United Nations, participating in the work on the Court. When he returned to Columbia in 1946, he was named the Hamilton Fish Professor of International Law and Diplomacy, succeeding Charles Cheney Hyde. His most influential book, *The Modern Law of Nations*, was completed in 1947. It was widely acclaimed, probably receiving more attention in the public media than any other book on international law ever had.¹⁶ His ideas on the international community interest, protection of individual rights and the regulation of force opened up vistas of a new postwar society.

Jessup was soon brought back to public life by appointments as a U.S. representative to UN bodies. One was the Committee on Codification and Progressive Development of International Law, entrusted with drafting the statute of the International Law Commission. The committee composed of

¹⁴ See *Hearings*, *supra* note 3, at 17-21, 196-224.

¹⁵ See Acheson, note 1 *supra*.

¹⁶ The *New York Times Book Review* carried a first-page review of the book by Supreme Court Justice Robert H. Jackson who was also the U.S. judge at the Nuremberg trials. Jackson lauded the book, observing that Jessup "rendered a genuine service in treating international law . . . as a living force in practical international affairs." N.Y. Times, Mar. 14, 1948, §7 (Book Review), at 1. The book also received highly favorable reviews in newspapers and journals of general circulation as well as in professional publications.

eminent international lawyers confronted problems of theory and methodology, as well as controversial political issues involved in codifying and developing international law. Jessup was drawn into these issues more deeply than at any previous time. It was an instructive period for him. His talent as a conciliator and draftsman served the committee well.

However, he was soon severed from the mainstream of international law by diplomatic appointments made by President Truman on the recommendation of Dean Acheson. In 1948 he was named deputy U.S. representative to the United Nations Security Council, a representative to the General Assembly and from 1949 to early 1953, ambassador-at-large. In these positions Jessup was thrust into the hostile confrontations between the United States and the Soviet Union and also into the difficulties with the Western European countries caused by the break-up of their colonial empires. He quickly attracted attention in the press. A *New York Times Magazine* piece wrote:

It is something the West Coast motion picture geniuses might have thought up in their fanciest flights—the tale of a hazel-eyed, pipe smoking Ph.D. who was taken from his intimate scholarly seminars to lead the diplomats of the western powers against one of the most brilliant firebrands and orators of our times, Russia's Foreign Minister Andrei Y. Vishinsky.¹⁷

Later, when Jessup desired to return to the “tranquil satisfactions of Morningside Heights,” the *Times* editorialized that “Dr. Jessup is too valuable in action to be permitted to give all or most of his time to thinking.”¹⁸ James Reston commented in 1949 that Jessup “has been one of the few pleasant surprises in the short history of the United Nations.”¹⁹ Dean Acheson persuaded Jessup to accept the post of an ambassador-at-large to represent the United States in international conferences and high-level negotiations. Eisenhower, then President of Columbia, granted an additional leave of absence and newspapers expressed gratitude to Jessup for setting aside his personal preferences to serve his country.

Jessup took to his enhanced diplomatic assignments with characteristic relish. He found himself engaged in negotiations with Soviet diplomats on various issues relating to the postwar settlements. In 1949, by opening a casual (though planned) conversation with the Soviet Ambassador, Jacob Malik, in the United Nations bar, he began a process that broke the perilous impasse over Berlin.²⁰ The incident fascinated journalists and it came to dominate all later references to Jessup. At the time of his death, newspaper obituaries treated the “barroom” diplomacy as if it were Jessup's major accomplishment.

¹⁷ N.Y. Times, Nov. 28, 1948, §8 (Magazine), at 32. These quotations and those following it from the *N.Y. Times* are taken from Gellhorn, *Philip C. Jessup: An International Diplomatist*, 24 COLUM. J. TRANSNAT'L L., at ix (1986).

¹⁸ N.Y. Times, Feb. 11, 1949, §1, at 22, col. 2.

¹⁹ *Id.*, Feb. 18, 1949, §1, at 19, col. 2.

²⁰ Acheson, *supra* note 1, at 6-7.

In fact, his hectic diplomatic service involved a number of developments that left their imprint on international society. The historic colonial empires were crumbling and the United Nations was faced with wars of national liberation and demands for political and economic self-determination. The ex-enemy states—Germany, Japan and Italy—were reentering the international community, each with its quota of divisive issues. Collective security, the centerpiece of the United Nations Charter, was gradually perceived as unworkable in the face of East-West hostilities; in its place, the collective defense pacts of the North Atlantic and Warsaw treaties came to dominate security relations. Jessup was close to the center of the stage as these momentous events were unfolding. It often fell to him to respond to vitriolic diatribes of the Russians and their allies. Behind the scenes, he engaged in the almost continuous negotiations that are the core of United Nations diplomacy and the mainspring of its occasional achievements.

These experiences did not result in his losing hope in the United Nations. In contrast to Dean Acheson and George Kennan (both of whom he admired), Jessup was neither bored by, nor contemptuous of, the United Nations and its protracted debates. He saw the Organization as helpful in current conflicts, especially those relating to national liberation, and as an organism destined to develop over time. It was evident to him that the United States could not solve by itself the difficulties it faced. Jessup's reflections on his diplomatic experiences in the United Nations were expressed mainly in two publications. The first, a series of Hague Academy lectures, was entitled *Parliamentary Diplomacy*.²¹ In it Jessup discussed the complicated system of procedural rules and maneuvering that had developed in the United Nations. The lectures were rich in detail and in practical insights, but in many respects the changing character of the United Nations has diminished their present relevance. Nonetheless, Jessup's pioneering analysis of the intricacies of procedural stratagems and the way important rules develop in the interstices of procedure is still instructive.

Jessup's principal book concerned with his diplomatic role was *The Birth of Nations*, published in 1974. It is based on his recollections, augmented by research in the official records as well as in personal scrapbooks and letters.²² The book is largely a personal memoir, anecdotal, often "undiplomatic," sometimes caustic. It describes the frenzied activity, tribulations and frustrations of the American diplomats coping with the postwar convulsions over which they had little control. Much is revealed of internal disputes, bureaucratic "snafus" and the almost continuous differences with the allies of the United States. The cast of characters is studded with world leaders, who generally impressed Jessup more favorably than he expected. He also refers to numerous officials who in semi-obscurity generated ideas and executed (or frustrated) policies.

²¹ Jessup, *Parliamentary Diplomacy: An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations*, 89 RECUEIL DES COURS 185 (1956 I).

²² Jessup described the book as "a joint venture" with his wife, Lois K. Jessup. Her letters and scrapbooks were among the prime sources used and she worked extensively on other sources and editing the manuscript. P. JESSUP, *THE BIRTH OF NATIONS*, at ix (1974).

Perhaps excessively detailed, the memoir succeeds in its depiction of the complexity of the individual efforts to cope with clashes of interest that defied diplomacy. Since he wrote some 20 years after the events described, Jessup was aware of the tragedies that followed the failures of those efforts—the costly wars in Korea and Vietnam, the troubles in Africa, north and south, the intractable Israel-Arab conflict. One of the more poignant chapters in the book describes, blow by blow, the efforts of Jessup and his colleagues to achieve a trusteeship solution to the Palestine crisis and the shattering effect on them of Truman's decision to recognize Israeli independence without even informing them.²³ Jessup does not conceal his anger over his humiliation and over Truman's aspersions that the State Department was pro-Arab,²⁴ but he also in fairness explains Truman's political motivations.²⁵ The book leaves no doubt that exhilarating as Jessup found high-level diplomacy, his optimistic belief in the efficacy of good will and reason was much shaken by his experiences.

THE ORDEAL OF MCCARTHYISM

Jessup's optimism must have received an even more shattering blow when he became the object of attacks by Senator McCarthy beginning in early 1950. Writing some 20 years later in *The Birth of Nations*, Jessup commented in a footnote that "the McCarthy persecutions are now as dead and discredited as the Spanish Inquisition."²⁶ While this was probably true in 1972, the impact of the McCarthy episode on Jessup's career and, more widely, on the course of American foreign policy was surely not minor.²⁷ The accusation by McCarthy that Jessup had "an unusual affinity for communist causes" burst on the American political scene with resounding effect. It came at a time when the *Alger Hiss* case and cases of other State Department officials had created widespread distrust of the American foreign policy establishment. Added to this were statements by the President and other government leaders that emphasized the Soviet threat and, from the Soviet side, vehement attacks on the United States in the then much publicized UN debates. Paranoiac feelings seemed to have taken hold of both Governments and many of their citizenry.

The assault on Jessup inevitably made the headlines. Next to General George Marshall, he was the most prominent target of McCarthy. He was at the center of the diplomatic battles, an influential intellectual. Even the fact that he often led the attack against the Soviets in the United Nations did not allay suspicion. To paranoiac McCarthyites, anti-Soviet statements could be a cover to hide pro-Soviet conspiracies. Jessup responded with trenchant counterattacks on McCarthy in public and before investigating bodies. The Loyalty Board of the State Department (an external tribunal

²³ *Id.* at 261–88.

²⁴ *Id.* at 289–97.

²⁵ *Id.* at 298.

²⁶ *Id.* at 343 n.23.

²⁷ For histories of McCarthyism, see D. OSHINSKY, *A CONSPIRACY SO IMMENSE* (1983); and F. COOK, *THE NIGHTMARE DECADE* (1971). The details of McCarthy's charges and Jessup's replies are most fully set forth in *Hearings*, *supra* note 3.

headed by a former Republican senator) cleared him of the charges in 1950 after a full inquiry and hearing. A Senate committee then reviewed these findings and agreed that the charges were baseless.²⁸ These determinations did not deter McCarthy and his supporters from pressing their attacks; the accusations continued to receive publicity implicating the Truman administration for its support of Jessup.

The particular accusations went back to Jessup's prewar activities and extended to more recent events. Charges were made of membership in suspect organizations and especially his active role in the Institute of Pacific Relations (IPR). That the directors of that organization were prominent conservatives was discounted. Jessup was said to have led the institute in its "smear campaign against Chiang Kai-shek and the Nationalists."²⁹ Moreover, Jessup had a favorable opinion of the institute's executive secretary and of some scholars in the institute who were alleged to have been members or supporters of the Communist Party. In addition to the Institute of Pacific Relations, other allegedly pro-Communist affiliations of Jessup were listed by McCarthy. Jessup showed that in some cases these affiliations were non-existent and that in others there was no evidence at the time of his association of any Communist links.³⁰

Thrown into the pot as well was Jessup's prewar advocacy of nonintervention when that had also been the Communist line. The accusers minimized the relevant fact that he had continued to be noninterventionist after the invasion of the USSR by the Nazis, in contrast to the Communist position.³¹

²⁸ See REPORT OF SENATE SUBCOMM. ON STATE DEPARTMENT LOYALTY BOARD INVESTIGATIONS [Tydings Committee], S. REP. NO. 2108, 81st Cong., 2d Sess. (1950).

²⁹ McCarthy charged that the IPR was "Jessup's organization" and that through the institute's publication *Far Eastern Survey*, Jessup had "pioneered the smear campaign against Nationalist China and Chiang Kai-shek." In fact, Jessup had no direct connection with the *Far Eastern Survey*. However, he was linked because as Chairman of the IPR Research Advisory Committee, he had approved of researchers whose subsequent writings appeared in the *Survey*. Jessup was also attacked as a supporter of Owen Lattimore, a prominent Far Eastern scholar, who edited the IPR journal *Pacific Affairs*. Lattimore had become a prime target of McCarthy who called him the No. 1 Soviet agent in the United States, a charge generally regarded as absurd in the light of Lattimore's record and writings and the testimony of those who knew him well. See F. COOK, *supra* note 27, at 209-39; D. OSHINSKY, *supra* note 27, at 147-55.

³⁰ *Hearings*, *supra* note 3, at 259-79. A sample of McCarthy's evidence of Communist links was his suggestion that the American Law Students Association (of which Jessup was one of a number of faculty advisers) had used the same printer as some "Communist front" organizations and that Jessup must have been aware of that. Also indicative of McCarthy's standards was the charge that Jessup helped Communist Chinese by his membership in the China Aid Council. In fact, Jessup was not a member of that council; Mrs. Jessup was. The Aid Council, moreover, was founded and headed by Madame Chiang Kai-shek to help war orphans; it included prominent Nationalist leaders. See *Hearings*, *supra* note 3, at 254-74. See also J. ANDERSON & R. MAY, MCCARTHY 229 (1953).

³¹ That Jessup had opposed the Communist line in 1941 did not impress William F. Buckley, Jr., who thought it "may have been protective coloration." See W. BUCKLEY, JR., & L. BOZELL, MCCARTHY AND HIS ENEMIES 122 (1954). These writers, generally supportive of McCarthy, conceded that some of McCarthy's charges may have been "overstated" and that Jessup may not have been a Communist sympathizer in 1949-1951, but that in previous years he had contributed "actively and passively to the communist cause." *Id.* at 123. Since he refused to acknowledge this, Buckley and Bozell declared he was not fit to hold a government post. *Id.* at 123-24.

His earlier espousal of lifting the embargo against Republican Spain was also made an issue even though his views on that were shared by many eminent American lawyers.³²

Jessup's testimony as a character witness in the trial of Alger Hiss was also presented as evidence of Jessup's sympathies. Jessup observed that he was called on to testify on an issue of fact—Hiss's reputation—and not to give his opinion; and that in law, he was under a duty to present such testimony.³³ The explanations did little to allay the opposition or indeed to change the views of those who simply believed that multiple charges must be evidence of some wrongdoing.

The most emphasis was placed on Jessup's views in regard to China. A principal thesis of the McCarthyites was that China had been "lost" to the Communists because of a small group of disloyal officials in the U.S. Government. A comprehensive factual "white paper" of the State Department indicated how absurd that accusation was.³⁴ This only had the effect, in McCarthy's world, of making the study evidence of the conspiracy and since Jessup was the principal person responsible for the study, he was implicated on that count. Particular attention was given to accusations that Jessup had favored recognition of the People's Republic. At the time of the Korean War, the idea of recognizing Red China was for many close to treason. Jessup's statements on China and on recognition were scrutinized minutely. Had he once favored the criterion of effective control, as had the British and many others? Had he ever contemplated that recognition might be considered? Jessup could readily show that he had supported the administration's position against recognition and had in fact played an active part in successful efforts to prevent the seating of the Peking regime in UN bodies.³⁵

However, that did not put the issue to rest. Headlines resulted when Harold Stassen, then President of the University of Pennsylvania and a well-known Republican political leader, charged publicly that he had direct evidence of Jessup's inclination to favor recognition of the mainland regime.³⁶ Stassen's allegations deserve mention only because they show the kind of flimsy charges that were taken seriously by respectable persons in that time of suspicion. One such item was a hearsay report that Jessup at a White House meeting in February 1949 had advocated ending aid to the Kuomintang forces in China.³⁷ This was taken very seriously until Jessup showed conclusively that he was in New York when the meeting took place.³⁸ Stassen's other "fact" was that, during a meeting of experts on China in 1949, Jessup remarked to Stassen that there was a "great deal of logic" in a suggestion that the United States might extract advantages by recognizing the Communist Government in return for concessions.³⁹ Jessup did not remember

³² *Id.* at 102–03. For Jessup's reply, see *Hearings, supra* note 3, at 196–213, 460–61.

³³ *Hearings, supra* note 3, at 278–85.

³⁴ Acheson wrote "that in spite of the abuse directed at this document . . . it has stood up admirably for thirty years as the definitive factual history of the period. This is due to Jessup's editing and supervision." Acheson, *supra* note 1, at 8.

³⁵ *Hearings, supra* note 3, at 631–32.

³⁶ *Id.* at 685 *et seq.*

³⁷ Stassen said this was told to him by Senator Vandenberg who had since died. *Id.* at 740.

³⁸ *Id.* at 891–96.

³⁹ *Id.* at 722.

this conversation either, a fact that Stassen alluded to as indicative of Jessup's lack of integrity.⁴⁰ Whether Jessup had ever suggested that recognition of Communist China might be "considered" became a focal issue for some senators in the subcommittee concerned with his nomination in 1951 as a representative to the United Nations. In that committee Jessup restated his opposition to recognition under the circumstances as they existed then. However, he maintained that if circumstances changed and the conditions of recognition expressed by the Secretary of State were met, it would be in the national interest and in accord with international law to extend recognition.⁴¹ Moreover, he added that while he did not favor the British position, which based recognition solely on effective control, he did not regard that position as evidence of a pro-Communist attitude.⁴²

The allegations by McCarthy and Stassen were examined by the Senate subcommittee in hearings on the Jessup nomination that resulted in over a thousand pages of testimony and exhibits. Jessup was given ample opportunity to explain his views, which he did in detail and with vigor. Two of the senators—Sparkman and Fulbright—sharply questioned the opposing witnesses, especially McCarthy. The committee received numerous letters by prominent persons attesting to Jessup's loyalty, integrity and ability. Three leading military leaders—Generals Marshall, Eisenhower and Lucius Clay—wrote in strong support of Jessup, as did dozens of leaders of the bar and of academic institutions.⁴³ One could not envisage a more impressive showing of support.

Reading the record, it is hard to believe that the committee could have withheld its approval of the nomination. Yet it did so by a vote of three to two. It did not, however, suggest that Jessup was disloyal. At least two of the senators voting against Jessup said they had no doubts whatever as to Jessup's loyalty but voted against him because public confidence in him had been undermined.⁴⁴ Truman did not press for a vote in the full Senate because a number of Democrats did not wish to be identified with the "Acheson-Jessup" policies. The Senate's failure to confirm Jessup did not actually prevent his appointment. Truman gave him a recess appointment as a representative to the 1952 General Assembly and he served until the

⁴⁰ Stassen insisted he was presenting facts and not opinions, but the record shows persistent attempts by him to draw damaging inferences from Jessup's denials as well as from Jessup's positions prior to World War II. Some commentators regarded Stassen as motivated in his attacks on Jessup by a political debt to McCarthy or by political opportunism. See F. COOK, *supra* note 27, at 204; J. ANDERSON & R. MAY, *supra* note 30, at 231-32. The hearings, however, suggest that Stassen had a strong animus against both Jessup and Acheson and genuinely believed his accusations to be well founded. When Stassen was an official in the Eisenhower administration, he clashed with McCarthy, to the latter's surprise; but then backed down on orders of the President. McCarthy told the press that Dulles had served him "Stassen-meat." See D. OSHINSKY, *supra* note 27, at 295-97.

⁴¹ *Hearings*, *supra* note 3, at 632-37.

⁴² *Id.*

⁴³ *Id.* at 150, 302-03.

⁴⁴ The *New Republic* headlined the story "Not Guilty—Fired." See D. OSHINSKY, *supra* note 27, at 213. See also *Hearings*, *supra* note 3, at 646, 733, 737. Truman apparently was persuaded that he could not win confirmation in the Senate since several Democratic senators were reluctant to appear to support the Acheson policies.

beginning of 1953. Later, some of McCarthy's supporters exulted that the attacks had put an end to his public life and sent him back to his books.⁴⁵

THE LATER YEARS: 1953-1986

Jessup did not appear to be crushed by the ordeal he had experienced. He returned to Columbia Law School in good spirits. It was a time of great interest in international law and particularly encouraging for graduate studies. Jessup attracted students from all parts of the world, many of whom attained positions of influence. It was also a time of scholarly productivity for Jessup. Whether McCarthyism still exacted a toll is a matter of conjecture. Some believed Jessup would have been elected to be the President of Columbia University, or perhaps of Yale or Stanford, if not for the attacks on him.⁴⁶ Less speculative is the fact that the United States Government, presumably Secretary of State Dulles, did not favor his appointment as a member of the International Law Commission in 1955 when the Commission "coopted" him to succeed Manley Hudson. Jessup then declined to sit on the Commission because he lacked support of his Government, even though the members serve in their individual capacity. McCarthy's influence had waned, but it seems likely that the administration's rejection of Jessup was influenced by the McCarthy episode and the earlier Republican opposition to his appointment as a UN delegate.

After the decline of McCarthyism, Jessup was much admired as one who had stood up to McCarthy and championed American ideals. In the decade that followed, he was often honored by international lawyers and by leading institutions in this country and abroad. He was elected President of the American Society of International Law in 1955 and Vice President of the Institut de Droit International in 1959. Several honorary degrees were awarded to him. He was chosen to give prestigious lecture series that led to notable publications. In 1959 the Rockefeller Foundation honored him with a unique appointment providing complete freedom to carry on scholarly and public work as he chose. Jessup did not remain long in that ideal position. In 1960, when the time came to choose an American nominee for the International Court of Justice, an unprecedented movement within the ranks of leading international lawyers emerged to support Jessup.⁴⁷ This time the Eisenhower administration supported his nomination in the United Nations organs. Jessup assumed his seat on the Court in February 1961.

Jessup was, of course, honored and pleased by the nomination and election. He must have felt, as did many of his friends, that it was a personal vindication and repudiation of the attacks on his loyalty and integrity. However, he was disappointed by the fact that the Court had few cases and appeared to be

⁴⁵ Buckley and Bozell, writing in 1954, observed ("happily") that Jessup was "finished" and forced out of public life by his failure to win Senate confirmation. W. BUCKLEY, JR., & L. BOZELL, *supra* note 31, at 96.

⁴⁶ It had earlier been reported that he had been considered at various times for the presidency of Yale, Stanford and Columbia. See Davidson, *supra* note 7.

⁴⁷ James N. Hyde and Richard R. Baxter were particularly active in this effort.

on the periphery of international affairs. He remarked in later years that he would have probably accomplished more and been happier personally if he had remained a Rockefeller Foundation associate or a Columbia professor. The relative isolation in The Hague and the personal tensions among the judges also dampened Jessup's enthusiasm. Nonetheless, Jessup remained a strong champion of the Court. It was the main subject on which he wrote and lectured during and after his term on the Court.

Jessup continued to be intellectually and professionally active after leaving the Court. He enjoyed the occasional role of counsel and advocate.⁴⁸ He was in demand as a speaker and lecturer and he used those opportunities to speak out strongly on issues he considered important. Active in nonofficial international legal bodies, he was seen throughout the world as the preeminent American international lawyer. He took a leading part in the work of the Institut de Droit International, in the Curatorium of the Hague Academy of International Law and in the ASIL and on this *Journal*.⁴⁹ No honor pleased him more than the ASIL's bestowing his name on the worldwide moot court competition in international law, known now as "the Jessup."

Jessup's last few years were marred by an increasingly debilitating illness that diminished his mobility and participation in professional life. However, it did not reduce his concern over tendencies in his own and other governments to weaken the role of law and of international institutions. To the very end he spoke out vigorously against those tendencies. He was still moved by his ideals of a decent, law-governed world, which took root after World War I and were matured over many years of reflection and experience. He never gave up his conviction that those ideals were worth fighting for.

JESSUP'S IDEAS ON INTERNATIONAL LAW

In his long, productive life, Jessup expressed himself on virtually all of the major issues of contemporary international law. He did so mainly in articles, lectures and AJIL editorials, many of which were collected and published in books. He never produced a comprehensive treatise or a grand theory. Typically, he addressed specific current issues and that led him often into fundamentals. He felt impelled to rebut the skeptics who questioned the reality of international law and the nationalists who construed the country's interests in a narrow way. Jessup's responses to them were essentially pragmatic. He stressed the essential role of rules in the day-to-day business of world affairs; he pointed to the costs of disorder and conflict in the absence of law; he sought to show how law furthered the shared interests of states.⁵⁰ In the same vein, he dealt with the meaning of rules and concepts, pointing

⁴⁸ See Hyde's memoir, *infra* pp. 905-06.

⁴⁹ Jessup was first elected as a member of the *Journal's* Board of Editors in 1929 and he remained an active member until his election to the International Court. After leaving the Court in 1971, he rejoined the board as an honorary member and was active in evaluating manuscripts and writing editorial comments and book reviews.

⁵⁰ See, e.g., *THE USE OF INTERNATIONAL LAW* (1958) and *THE MODERN LAW OF NATIONS*, ch. 1 (1948) [hereinafter cited as *MODERN LAW*].

out always how the issues bore on the interests of the governments and peoples concerned. His concern with the function of rules is evident particularly in his judicial opinions such as those in *Barcelona Traction*⁵¹ and the *North Sea Continental Shelf Cases*⁵² and in his writings on state responsibility.⁵³

Jessup's practicality led him to make numerous suggestions to improve the process of conflict resolution and the efficacy of international law. He did not disdain small, concrete proposals involving procedural changes or institutional arrangements. Broadly speaking, he was an incrementalist and he tended to be skeptical of grand projects to change the existing order. Experience rather than theory was his guide. It is easy to see why men of affairs such as President Kennedy⁵⁴ and Dean Acheson were favorably impressed by his practical approach.

However, his pragmatism was also imbued with a distinct teleological element. Like Elihu Root, his early mentor, Jessup saw the main trends of international society as part of an evolutionary development toward a more organized and effective legal order. The main features of that order could be briefly summarized as follows: recognition of the interest of the international community; protection of the basic rights of individuals; the prohibition of armed force except in self-defense; recourse to judicial procedures or conciliation for dispute settlement; the extension of international regulation and administration in areas of interdependence, global and regional. For Jessup, these ends appeared almost axiomatic. They described the direction in which the world had to move in its enlightened self-interest. The optimism of an earlier age and Jessup's own buoyant spirit are reflected in this outlook.

Jessup's theoretical assumptions were implicit in his analysis of specific issues. They could be characterized as a sophisticated blend of positivism, idealism and pragmatism. He was always careful to distinguish positive law—the *lex lata*—from proposed or predicted future law. At the same time, he was mindful that positive law included principles and concepts that expressed basic values and that these "received ideals" were authoritative guides in construing and extending existing rules. In this manner, his approach transcended strict positivism. It is well exemplified in *The Modern Law of Nations*. Concepts as general as the freedom of the seas, *pacta sunt servanda*, sovereign equality, the obligations of peaceful settlement, self-determination, equitable sharing, are among those persuasively used to infuse values into concrete decisions. Like a good practitioner, Jessup believed a stronger case for a new rule can be made by linking it to an established principle. He was also aware that broadly stated policies in legal instruments must be construed with regard to the consensus of the community on which their authority

⁵¹ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v Spain) (New Application)*, 1970 ICJ REP. 4, 162–221 (Judgment of Feb. 5) (Jessup, J., sep. op.).

⁵² *North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.)*, 1969 ICJ REP. 3, 77–85 (Judgment of Feb. 20) (Jessup, J., sep. op.).

⁵³ P. JESSUP, *MODERN LAW*, *supra* note 50, chs. V and VI.

⁵⁴ See Kennedy, *Dedication*, 62 COLUM. L. REV. 1123 (1962). President Kennedy's "dedication" was in the *Columbia Law Review* issue in honor of Jessup.

ultimately depends. The fact that social ends are plural and often conflict impressed him with the necessity for balancing competing considerations in reaching particular decisions.

These essentially pragmatic concerns led Jessup to devote considerable attention to the functions served by the rules at issue and to the particular facts of the case under consideration. His individual opinions as a judge, especially in the *North Sea Continental Shelf* and *Barcelona Traction* cases, are good examples. Many of his short articles and editorials are similarly highly factual. He liked the adage: *ex factis ius oritur*. But, as already noted, this did not lead him to minimize the value of broad concepts.

Prominent among such concepts was the idea of the international community interest, a notion, he pointed out, expressed by Elihu Root in an address made in 1915.⁵⁵ Root defined the concept in lawyers' terms, proposing that international law, like domestic law, accept the principle that certain wrongs are injuries to the community as a whole. Consequently, redress should not be limited only to a state directly affected by the violation. Jessup perceived this idea as an essential feature of the Covenant of the League and the collective security provisions of the UN Charter. It had evolved into a principle that extended beyond the unlawful use of force (which Root had stressed on the analogy of domestic criminal law). Jessup considered the concept applicable to the mandate and trusteeship arrangements, to the conservation of ocean resources and, most recently, to protection of the global environment. He found it a significant factor in the cases on South West Africa brought by Ethiopia and Liberia against South Africa in the 1960s on the basis of the mandate of the League of Nations. In his separate opinion to the 1962 Judgment of the Court,⁵⁶ Jessup described the precedents recognizing that states have legal interests in matters that do not concern their material or tangible interests or those of their nationals but that are of general concern to all states. He noted especially the cases in which a state had concerned itself on general humanitarian grounds with atrocities in another country.⁵⁷

In the second phase of the case in 1966, Jessup in his incisive dissenting opinion declared that "States may have a general interest—cognizable in the International Court—in the maintenance of an international régime adopted for the common benefit of the international society" without the necessity of asserting a direct injury to them or their nationals.⁵⁸ These views presage the Court's *obiter dicta* in the *Barcelona Traction* case that recognized a category of *erga omnes* obligations owed to the international community as a whole.⁵⁹ It seems likely in the light of Jessup's earlier opinions that he had an important role in the Court's formulation of the *erga omnes* principle.

The idea of the international community interest was also given signifi-

⁵⁵ Root, *The Outlook for International Law*, 9 ASIL PROC. 7-9 (1915).

⁵⁶ South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Preliminary Objections, 1962 ICJ REP. 319, 425-33 (Judgment of Dec. 21) (Jessup, J., sep. op.).

⁵⁷ *Id.* at 425-29.

⁵⁸ South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Second Phase, 1966 ICJ REP. 6, 373-74 (Judgment of July 18) (Jessup, J., dissenting).

⁵⁹ *Barcelona Traction*, 1970 ICJ REP. at 32.

cance by Jessup in his 1966 dissenting opinion where he concluded that the standard laid down in the mandate must be applied by taking account of "the views and attitudes of the international community."⁶⁰ He treated the relevant resolutions of the UN General Assembly as "proof of the pertinent contemporary international community standard."⁶¹ In presenting this view, Jessup made it clear that it does not signify that the General Assembly may create new law by its resolutions inasmuch as in the *South West Africa* case the Court was applying a standard laid down in an existing treaty. Thus, Jessup gave effect to the strong objections to apartheid expressed by nearly all states without endowing the Assembly resolutions with legislative effect.

The importance attached by Jessup to the idea of the interests of the international community did not mean that he regarded all such interests as universal. Particularly in his later writings, he laid emphasis on the non-universal "selective" communities, joined by common interest, geography or shared values.⁶² These diverse communities have been increasingly the basis of new legal arrangements; notable examples are the European Economic Community, and the functional groupings concerned with maritime and economic arrangements. Though Jessup recognized the growing role of nonuniversal communities, he also emphasized the universal character of basic principles of the Charter and general international law. Thus, he argued for the universal application of the rule against the use of force (except in self-defense) and against the idea that armed force may be used in wars of liberation or by foreign states in civil wars.⁶³

He also considered that the law of state responsibility for injuries to aliens should have universal application in its essential aspects, noting that abuses by powerful states typified by "gunboat diplomacy" have now been eliminated.⁶⁴ In regard to the law of the sea, he saw the need for general rules to safeguard navigation, fishing and environmental protection and the desirability of nonuniversal arrangements to manage resource exploitation and settle disputes. His general approach underlies what he considered to be universally accepted ideas of order, responsibility and justice, while recognizing that diversity and special conditions create many different kinds of international communities with their own special interests and law.

Related to Jessup's conception of the international community was his notion of "transnational law," a term he did not invent but which was developed and popularized in his Storrs lectures of 1956.⁶⁵ With that notion, Jessup sought to show the growing legal complexity of an interdependent world. The international legal realm could no longer be compartmentalized in its two classic divisions of public international law, applicable only to relations among states, and private international law, governing choice of law and enforcement of national judgments in cases involving nationals of two or more states. The legal rules and process applicable to situations that cut

⁶⁰ *South West Africa*, 1966 ICJ REP. at 441. ⁶¹ *Id.*

⁶² Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AJIL 341 (1964); Jessup, *Non-Universal International Law*, 12 COLUM. J. TRANSNAT'L L. 415 (1973).

⁶³ *Non-Universal International Law*, *supra* note 62, at 423-29.

⁶⁴ 1970 ICJ REP. at 164.

⁶⁵ P. JESSUP, *TRANSNATIONAL LAW* (1956).

across national lines must now be sought in both public and private international law and, to a significant degree, in new bodies of law that do not fit into either traditional division. As examples of the latter, Jessup cited the growing areas of European Community law, maritime law, international administrative law, war crimes, the law of economic development and the rules applicable to multinational enterprises.

Jessup's aim was not merely to chart the new fields of law but to underline the extent to which these new fields were based on new relations of interdependence. Outmoded conceptions of international law as a law applicable to states alone had to be modified and the "mysteries" of the distinction between public and private law could not govern the new relations of individuals and states.⁶⁶ One early consequence of the increased recognition of "transnational law" has been the growth of law school courses concerned with international transactions, human rights, international economic and social arrangements and other transnational subjects that did not fit neatly into the traditional divisions of public and private international law.⁶⁷

Jessup envisaged the international community as having a paramount interest in the areas outside of national jurisdiction. He saw outer space as a *res communis* that required international administration to avoid national conflict.⁶⁸ A similar conception was advanced for Antarctica.⁶⁹ These proposals represented for Jessup an evolutionary advance from a decentralized system based on reciprocity to more centralized regulation on matters "which escape the old territorial realm of national sovereignty."⁷⁰ Science and technology were seen as the moving forces in expanding the area of community interests and requiring international administration to serve fairly the needs of all. Jessup did not attempt to demonstrate why the recognition of the community interest would prevail over national interests, nor did he foresee the strong resistance that powerful states would interpose to international management of wealth-producing areas. The seabed, the geostationary zone of outer space and Antarctica remain areas of contention. It remains to be seen whether Jessup's vision of international administration will come about, as he suggested, because of practical necessity and a perceived common interest.

Jessup's interest in the widening scope of international law included particular emphasis on protection of the rights of individuals, a theme he developed in *The Modern Law of Nations*. True to his evolutionary perspective, he saw the historic progression of such rights as proceeding from relatively isolated cases of humanitarian intervention, through the adoption of special treaties (as those on minorities), to the Charter obligation to respect and promote human rights and eventually the more detailed Covenants with provision for complaints by individuals. He was among the first to maintain

⁶⁶ Jessup, *The Present State of Transnational Law*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 339 (M. Bos ed. 1973).

⁶⁷ See Oliver, *Philip C. Jessup's Continuing Contribution to International Law*, 62 COLUM. L. REV. 1132 (1962).

⁶⁸ P. JESSUP & H. TAUBENFELD, *CONTROLS FOR OUTER SPACE AND THE ANTARCTIC ANALOGY* 222-82 (1959).

⁶⁹ *Id.* at 171-90.

⁷⁰ *Id.* at 140-53.

that Charter Articles 55 and 56 imposed obligations in regard to human rights and removed human rights from the exclusive sphere of domestic jurisdiction.⁷¹ However, he also foresaw difficulties in universalizing national practices and he cautioned against efforts to extend American concepts to the rest of the world. "The human rights to be defined and protected must be considered not in a vacuum of theory but in terms of the constitutions and laws and practices" of all the states of the world.⁷²

Throughout his career, Jessup was an outspoken advocate of a wider use of judicial settlement by governments. No single subject occupied him more than the International Court of Justice. In addresses, editorials and books, he explained why the Court should be used, detailing the many instances in which third-party settlement through the Court or other tribunals had been successful. He strongly criticized the United States for adhering to the self-judging reservation of the Connally Amendment.⁷³ While there was at times almost an evangelical flavor to his advocacy of judicial settlement, he recognized that many disputes were best left to negotiation or mediation. His practical outlook led him to propose modest measures to enhance use of the International Court. They included, for example, the use of special Chambers by the Court to speed decisions and to accommodate regional or functional interests (for example, a Chamber for African disputes and one for environmental issues).⁷⁴ Knowing that governments were reluctant to submit to binding judgments, he proposed to increase the nonbinding advisory opinions of the Court by extending the right to request such opinions to the UN Secretary-General, the International Law Commission and a special committee of the General Assembly. He enthusiastically supported a proposal under which the highest national courts faced with questions of international law would be able to seek advisory opinions from the International Court.⁷⁵ Although these proposals were favored in academic and professional circles, they have not won support from major governments.

Jessup's pervasive optimism may seem merely wishful today when weapons, rather than law, are seen as the guarantee of security. Jessup left no doubt that he regarded such "realism" as myopic. In the last decade of his life, he vigorously criticized his own government for its increasing disregard of the United Nations and the Court. He made it plain that he had no illusions about the Soviet Union, or for that matter, other big powers. But he had the abiding conviction that the United States would have to take the lead, in keeping with its traditions and principles, to achieve an international society governed by law. It is now left to others to convince those in power of the essential soundness of Jessup's conviction.

⁷¹ P. JESSUP, *MODERN LAW*, *supra* note 50, at 87-89. Jessup was strongly criticized in the U.S. Senate for his view that the Charter imposed legal obligations in respect to human rights. 97 CONG. REC. S11,744-48 (daily ed. Sept. 18, 1951).

⁷² P. JESSUP, *MODERN LAW*, *supra* note 50, at 92.

⁷³ P. JESSUP, *THE USE OF INTERNATIONAL LAW*, *supra* note 50, at 46-62.

⁷⁴ P. JESSUP, *THE PRICE OF INTERNATIONAL JUSTICE* 61-70 (1971).

⁷⁵ *Id.* at 76-80. Jessup attributed the idea to a comment of H. Lauterpacht in the latter's *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y.B. INT'L L. 65, 95 (1929).

JESSUP: MEMORIALS AND REMINISCENCES

I.

*By Manfred Lachs**

To write of Philip Jessup means to survey the history of the teaching of international law in the United States throughout the last half century; to cover all important events concerning the birth of international organizations on the morrow of the Second World War; to visit the halls of the General Assembly and the Security Council; to attend meetings of the American Society of International Law and the Institute of International Law, where he so frequently took the floor to shed light on their debates; to attend sittings of the International Court of Justice in the years 1960–1969. I could hardly undertake this task; there are others much more qualified to do so. What I wish to do is to recall him as a great jurist I knew and a delightful human being; in short, a judge and a great friend whom I learned to admire.

It is reported of Oliver Wendell Holmes that, after serving in the Civil War, in which he was wounded, he decided to become a lawyer. He went to his father's study and told him, "I am going to law school." Holmes, Sr. looked up from his desk and said, "What is the use of that? Wendell, a lawyer can't be a great man." Now we look back on him as one of the great jurists of his time.

How Philip Jessup came to be a lawyer I failed to ask him, though I intended to do so on several occasions and somehow missed the opportunity.†

Upon meeting him, one could not help being impressed by his personality. As he was quite tall, he had to look down at his companion, but in a way so modest that one felt elevated by the kindness of his regard, and impressed by his special capacity to discuss issues of great importance and then suddenly revert to minor problems; he was marked by a curious combination of knowledge, industry, deep humanity and an exceptional sense of humor. He was richly endowed by nature, and all who spent even an hour with him could be certain that they would not be discussing dry law and cases; they would survey a much wider field and Jessup would lead his interlocutors into valleys and mountains they had never visited before. The three years we served on the International Court of Justice together remain memorable to me, for it was then that we established deep ties of cooperation and friendship.

As a judge, Jessup tried to translate into practice the ideas he preached as a teacher. He saw international law as "the law applicable to the complex

* Judge and former President of the International Court of Justice.

† *Editor's note:* For an answer paralleling the experience of Justice Holmes, see the companion piece by Philip Jessup, Jr., *infra* at pp. 908–09.

interrelated world community which may be described as beginning with the individual and reaching on up to the so-called 'family of nations' or 'society of states.'"¹ In each aspect of his subject, he tried to survey the whole field, presenting to us many illustrations in different areas of relations between individuals and corporations, some of them very interesting and lively, reflecting fruitful confrontation. Logically, he tried to deal with the problems that are so essential to the effectivity of law: the problems of power in all its dimensions. As he wrote before joining the Court, he saw the various aspects of each issue: some he qualified as "individual, corporate, interregional, or international."²

Among those who sensed and believed in the imperative need for change in law as a function of changing conditions of life in changing states and a changing world, Philip Jessup was perhaps the leading figure. In talks while walking together to the Court, or during our deliberations, I felt his deep commitment to "parliamentary diplomacy," his urge to improve the United Nations and to enhance the role of the Court within it.³ Someone said of the two leading Justices in the United States that "Holmes was an enlightened skeptic and Brandeis the militant crusader." Where would you place Philip Jessup? I think he would be the *enlightened crusader*. For enlightened he was, and throughout his years on the Court, he shared with his colleagues his deep knowledge of life and impressed upon them the need to move forward, to seek new ways to improve relations between states and individuals. He described this task as, "the rocky road to international justice," "the price to be paid for peace and the international machinery of justice." This is how he presented the development of the modern settlement of disputes to lawyers, illustrating it in a sophisticated, yet simple, clear way, analyzing well-known cases of the past.⁴

However, even more impressive were his statements as a judge: his opinions. I could quote them ad infinitum, but let me refer to some of particular significance. When I joined the Court, Jessup was entering his seventh year of service—seven years during which he was able to make an important contribution to the work of the Court, through the discussions, debates and his individual opinions. How unfortunate that the case to which he devoted so much attention was decided against his views! On the functions and humanitarian goals of international law, he said: "International law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other 'material', or, say, 'physical' or 'tangible'

¹ P. JESSUP, *TRANSNATIONAL LAW* 1 (1956).

² *Id.* at 15-16.

³ We raised these issues at a conference at New York University sponsored by Professor Thomas M. Franck, who brought together several members of the U.S. federal and Canadian judiciary with six colleagues to discuss "The Future of the World Court." I had the honor of presiding over the deliberations. See also Jessup's lecture at the Hague Academy, *To Form a More Perfect United Nations*, 129 *RECUEIL DES COURS* 1 (1970 I).

⁴ See his Jacob Blaustein lectures, *THE PRICE OF INTERNATIONAL JUSTICE* (1971); and *The Development of a United States Approach toward the International Court of Justice*, 5 *VAND. J. TRANS-NAT'L L.* 1 (1971).

interests."⁵ He was almost forecasting the famous dictum in the *Barcelona Traction* case on obligations "*erga omnes*."⁶ He saw the real object and purpose of the mandate system established by the League of Nations, and the meaning of the famous Article 22 of the Covenant, which made him recall the words of the delegate of Sweden at the League Assembly, "moral interests for the natives."⁷

Jessup was deeply hurt by the Judgment in the *South West Africa Cases* in 1966. It must have cost a man of his kindness and courtesy much pain and much resolution to write:

In my opinion, the Court is not legally justified in stopping at the threshold of the case, avoiding a decision on the fundamental question whether the policy and practice of apartheid in the mandated territory of South West Africa is compatible with the discharge of the "sacred trust" confided to the Republic of South Africa as Mandatory.⁸

This was, of course, one of the strongest dissenting opinions ever delivered, one reflecting not only the legal and intellectual personality of the judge, but also his deep human feelings.

It led him to the conclusion:

Today's Judgment does not ignore humanitarian considerations, or the "moral ideal" of the sacred trust, but seeks to find where and how they have been "given juridical expression" and "clothed in legal form". With due respect, I explore these same areas, but find the "juridical expression" and "legal form" lead to legal conclusions different from those reached by the Court.⁹

For him apartheid was not just a political question.¹⁰ This Judgment was, no doubt, viewed by Jessup as a defeat. He returned to the subject in many conversations with me. That is why he welcomed with such satisfaction the initiative taken several years later to bring the issue back to the Court by way of a request from the Security Council for an advisory opinion.¹¹ In letters he wrote to me, while regretting his absence, he expressed particular satisfaction with the Court's decision, confirming, as it did, his own views delivered several years earlier.

He was gratified to see some of his views taken into account in the *North Sea Continental Shelf Cases*.¹² He had pleaded for an equitable solution and

⁵ *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Preliminary Objections, 1962 ICJ REP. 319, 425-30 (Judgment of Dec. 21) (Jessup, J., sep. op.).

⁶ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)* (New Application), 1970 ICJ REP. 4, 32, para. 33 (Judgment of Feb. 5).

⁷ 1962 ICJ REP. at 430.

⁸ *South West Africa* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Second Phase, 1966 ICJ REP. 6, 325 (Judgment of July 18) (Jessup, J., dissenting).

⁹ *Id.* at 441.

¹⁰ *Id.* at 442.

¹¹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21). See *id.* at 57, para. 131.

¹² Such situations may be resolved by an "agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing par-

equitable apportionment, and the possibility of joint exploitation with regard to known and as yet undiscovered resources.¹³ It was, of course, regrettable that during the years of his service on the Court, he had so few cases to deal with. However, he found comfort in the fact that, with the passing years, interest in the Court was growing. He took particular satisfaction in the submission to it of the *Gulf of Maine* case.

Speaking of Jessup's work on the Court, I cannot fail to mention two initiatives on which we worked very closely together: the first was the revision of the Rules of Court. We discussed it within days of my arrival as an urgent task, and fully agreed that the Rules, as drafted in 1946, which in fact were mostly copied from the Rules of 1922, required modernization and amendment. We were both members of the first Rules Committee, which began its work in 1968. Inter alia, we both had in mind the opening of new possibilities for the creation of Chambers. Thus, it became possible to establish the Chamber that resolved the *Gulf of Maine* dispute between the United States and Canada; and another Chamber has been considering the dispute between Burkina Faso and Mali.

The other activity on which we collaborated concerned the position of the Court in the international community. It is a matter of historical record that the Court, the "principal judicial organ of the United Nations," had been detached from the mainstream of international events and had almost no contact with other UN organs. We both felt that something should be done about it by international organizations and states, and that the Court itself should not remain passive. At the first meeting of the Court that I attended, on April 12, 1967, we raised the question of closer contacts with the UN Secretary-General and the General Assembly and of placing that relationship on a permanent basis.

In furtherance of better understanding of the Court's role, Jessup took the initiative of inviting some prominent countrymen. I remember at least two or three meetings with senators and representatives he brought to the Court to get them more interested in our institution. Our intention, of course, was not to solicit cases, but to make parliamentarians and members of governments more aware of the existence and functions of the Court. Thus, in 1967 we established the Relations Committee, which has made an important contribution to increasing understanding and knowledge of the Court. That this was necessary has been proved on many occasions.

After leaving the Court, Jessup retained his great interest in it; in fact, it remained at the center of his interests. In the many letters we exchanged, he constantly mentioned it with deep affection. For, apart from his other qualities, he was a great letter writer: he felt a need to share his thoughts

ticularly appropriate when it is a question of preserving the unity of a deposit." North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 52, para. 99 (Judgment of Feb. 20).

¹³ See Jessup's separate opinion, *id.* at 67-85. Here, again, he showed mastery of the subject, both in law and in fact, an inside knowledge of all the complexities resulting from previous oil explorations and agreements on the matter concluded by states.

and feelings and returned frequently to the days at the Peace Palace. This desire he had expressed earlier by exchanging notes and comments during our deliberations. I kept some of them. I will quote only one: "The division of mind has brought to light a momentous decision," he wrote. I replied, "It was your work."

In the last years of his life, Jessup took particular interest in an idea launched some time ago, to authorize supreme courts of individual states to request advisory opinions of the Court. He raised it in correspondence with his colleagues and reminded me of it in one of his last letters. Actually, the idea was pursued later by other scholars. He tried to enrich us further by his writings. His health was failing. In a letter of December 15, 1981, he called the enclosed article, "My latest—and last."¹⁴ I protested. Several letters followed; then came the last: New Year wishes for 1986.

Jessup remained a staunch believer in the international judiciary. He saw in it a confirmation of his profound belief in the peaceful cooperation of nations deeply rooted in law.

In a world of skeptics and cynics, he was a great exception. He believed in man and all that is good in him. He never tried to ridicule even those with whom he did not agree. He tried to see the point of view of his opponents and thus was a perfect partner for a dialogue, which can shape not only words and discussions, but also events. To me, he was typified by the wise words: "All I wish to know is to understand in common, simple words the problems that face us in the world of today."

This search was the background to his thoughts on what he called "Diversity and Uniformity in the Law of Nations." In a lecture delivered at Leiden University (in 1964), he made an attempt to indicate the development of international law in various areas: the creation of new laws, the assimilation of existing laws.¹⁵ He saw diversity as a fact that cannot be done away with. He saw that agreement is possible on very many issues and that an efficient international legal order can be created. He supported U Thant and his plea to make the world "safe for diversity," and so rightly added: "In a world so oriented, none need despair that there will be general international realization of the common interest or that the timeless tide will still flow toward uniformity in the law of nations."¹⁶ There could have been no better expression of his vision of the importance of international law:

May it be said that the truly constructive power of *international law* is to be found in the fact that, being the law of all the nations in the international community, it cannot be wielded to fit the interest or the whim of any one member of the community which seeks to invoke it?¹⁷

To him, diversity and unity supplemented each other. This was Philip Jessup's greatness: where others saw dichotomy, he saw unity; where others saw

¹⁴ Jessup, *Intervention in the International Court*, 75 AJIL 903 (1981).

¹⁵ Cf. *Diversity and Uniformity in the Law of Nations*, 58 AJIL 341 (1964) (reprinting the bulk of the lecture).

¹⁶ *Id.* at 358.

¹⁷ *Id.* at 352.

division, he tried to find elements that unite men and bring them together to serve a common goal and in common interests.

Thus, he was much more than an international lawyer. Looking into the past, drawing conclusions from the mistakes of yesterday, or what one may call the diary of defeat, he projected his thoughts into tomorrow. He spoke well, convincingly, never trying to impose his will, by trying rather to convey his thoughts in a way that others would understand. He saw in history a road leading to progress and to better inter-human understanding. He was continuously putting questions to himself and to others, so as to find a reply or to provoke others into helping him find a reply. A meeting with him was therefore for me always exciting and intellectually stimulating. It always led to something new.

From the height of philosophical considerations, he descended to the practice of life, seeking solutions to problems facing relations between individuals and states, and particularly those he thought created unnecessary difficulties.

A man of great wisdom and tolerance, of great modesty and humility, a friend upon whom one could rely, Philip Jessup enriched our generation and those to come by his outstanding work. A man of sincerity of thought and clarity of desire, he was an embellishment of the Court and an important pillar of that institution. Thus, we can consider ourselves fortunate to have known him and to have worked with him. For me, it was a pleasure and a privilege. His photograph inscribed "To a Great Friend" is a permanent feature on my desk, and will remain so.

II.

*By Stephen M. Schwebel**

Not having been privileged to study, or work more than fleetingly, with Philip Jessup, I write from a less informed and intimate perspective than his colleagues and, of course, his son. Not that Jessup was a distant figure, for he conveyed to all who knew him, or even encountered him, a warmth and sympathy that was exceptional. No man in the world of international law aroused more universal admiration and affection than did Philip Jessup.

Jessup was an exemplar of a humane liberalism in international affairs, having at the same time an affinity with the sort of conservative internationalism that Elihu Root embodied. Through Root, whose biographer he was and aide he had been, Jessup's links with the World Court went back to its beginnings. He was assistant to Root at the Conference of Jurists on the Permanent Court of International Justice, which met in Geneva in 1929

* Judge of the International Court of Justice.

to consider revisions of the Statute in whose initial drafting Root had played so large a part. Aside from the eminence of his qualifications, Jessup's election to the Court in 1960 was the more fitting in the light of his long-standing relationship with Root and the Court's antecedents.

Jessup played in respect of the United Nations International Law Commission a seminal role, like that which Root had played with respect to the Court; he served on the United Nations Committee on the Progressive Development of International Law and its Codification, which, in 1947, recommended the creation of the Commission and submitted a draft of its statute. Judge Manley O. Hudson served on the Commission as the first member of United States nationality until a stroke required him to retire. Jessup was the choice of the Commission's members at the stage when it was called upon to fill the resultant vacancy in a casual election. He was, most regrettably, not the choice of the Government he had served with such distinction as United Nations delegate and ambassador-at-large. Why that was so is not clear: perhaps the administration of the day was influenced by slanders of Senator McCarthy, of which Jessup had been one of many victims; perhaps the attractions of making a political appointment to a quintessentially expert position were too much for it. At any rate, Jessup declined to accept election to the Commission without the support of his Government even though members of the Commission serve in an independent capacity.

Nevertheless, as Court elections in 1960 loomed not long after, the question of Jessup's election to the Court was raised in the most elevated circles of the profession, in The Hague and elsewhere. Prior to 1960, the members of the United States National Group in the Permanent Court of Arbitration apparently had not carried out consultations with the Supreme Court, legal faculties and learned societies, as recommended by Article 6 of the Statute of the Court. Nor previously, it seems, had the National Group actually met as a group in deciding upon its nominations. Those procedures were altered for the better in 1960, as the then Professor Richard R. Baxter—who was more involved in all this than his Note indicates—observed in writing on *The Procedures Employed in Connection with the United States Nominations for the International Court in 1960* (55 AJIL 445 (1961)). The result of those consultations was overwhelming support for Jessup's nomination. To its credit, the same administration that had not supported his election to the International Law Commission did not question his nomination by the National Group for election to the Court.

My colleague Manfred Lachs has written in this issue about Jessup's contribution to the Court with the insight of one who was privileged to share Court service with him. My view of Jessup in those days came from the other side of the bench, in the effort to rescue the finances of the United Nations, which again today are under siege not only from compounded defaults that go back to the 1950s but from fresh withholdings, and in the contingency planning of the State Department to give effect to a judgment on the merits in the *South West Africa Cases* which, as it turned out, never came down. Jessup's resultant dissent is justly famous. The view of Jessup then held in the Office of the Legal Adviser of the Department of State was one reflected

the world over in like offices and in the profession at large: a man whose superb intellect, legal imagination and liberal ethic were matched by a character and grace no less outstanding.

Philip Jessup exercised his surpassing qualities of mind and character to the great good of his life, of those fortunate enough to be touched by it, and of the national and international community, which is and will remain in his debt.

III.

*By James N. Hyde**

Throughout his career, Philip C. Jessup was passionately committed to the use of law and diplomacy for the peaceful settlement of international disputes. He provided a generation of leadership in the wide and difficult endeavor that he characterized as "transnational law"—by which he meant to emphasize the importance of a wider storehouse of rules and avoidance of the dogmas and fictions associated with traditional international law.

Jessup saw international organization in general and the United Nations in particular as important elements of a modern law of nations, especially in their concern for the individual as a subject of international law. In the early days of the United Nations, he promoted the development of "parliamentary diplomacy," a term for multilateral negotiation in United Nations bodies.¹ He believed that it was a genuine type of diplomacy in which lawyers were well equipped to engage. He combined this modern conceptual approach with scholarly depth and precision in dealing with concrete cases. These qualities are reflected in Jessup's well-known dissent in the *South West Africa Cases*.

All this I learned from my long association with him, first as his assistant in 1948 at the United States Mission to the United Nations, and then as a colleague after he left the Court in the 1970s. In our practice, we studied and worked together and traveled extensively, once even around the world.

During my association with Jessup at the U.S. Mission and the 1949–1950 General Assembly session in Paris, he began by working with the Interim Committee (the "Little Assembly") where he drafted a new "General Act" to bring up to date the League of Nations pacific settlement treaty. But in Paris we passed days and nights on end dealing with the Dutch military action in Indonesia, and Indonesia's ultimate independence. After long days of negotiation, we would spend part of the night replying to "NIACTs" (night action telegrams from the State Department). The crisis came over

* Of the Board of Editors.

¹ See, e.g., Jessup, *Parliamentary Diplomacy: An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations*, 89 RECUEIL DES COURS 185, 234 (1956 I).

the Christmas holidays when the U.S. Assembly delegation was en route home and Jessup in charge. As on various other occasions, he was dogged by ill health and, though recuperating from pneumonia, flew back to Paris from the Riviera to sit in the Security Council, which we were instructed to summon in emergency session. It was also in late fall in Paris that he put forward Israel's application for membership in the United Nations. Action was postponed to a Security Council meeting in New York, at the request of another government, and I was put to work doing research on the attributes of a state, especially related to boundaries.

Jessup left the U.S. Mission at the end of 1949 for the State Department, where as ambassador-at-large he became involved with the Berlin crisis and the creation of NATO. I did not participate in his important work on the Berlin crisis, but I remember his commenting that NATO would be essential to U.S. security in the light of political deadlocks in the Security Council. One of his assistants at the State Department was Louis H. Pollak (now a U.S. district judge). Another special assistant, Ambassador Charles E. Bohlen, attributed to Jessup much of the credit for ending the Berlin blockade. Bohlen commented in his memoirs that Jessup "would never rush into any ill-considered action. He was an excellent diplomat, who could always be counted on to carry out with intelligence and precision the instructions he received from his government."²

After Eisenhower's election in 1952, Jessup resumed his chair at Columbia University, which he held until his election to the International Court in 1960. During this period he gave increasing time to outside activities. In the late fifties, we began our association in private practice, and were retained by Thailand in the *Temple* case.

Dean Rusk, then President of the Rockefeller Foundation, drew Jessup into taking leave from Columbia, and acting as a widely ranging and traveling senior consultant to the foundation. I described him as "ambassador-at-large" to the Third World countries then acquiring independence. This approach was later so named and applied by the Rockefeller Brothers Fund. In our practice there were the usual pressures of time and deadlines, and research beyond legal materials. We were sometimes concerned with finding and evaluating maps, and drawn into the most detailed analysis and evaluation of United Nations resolutions. In these activities Irene Winkelman, with her background in the U.S. Mission to the United Nations, helped us on many occasions. When we were retained by a client, there were usually preliminaries before we began developing theory and tactics. For example, at an early meeting in the *Temple* case, our client, the Government of Thailand, asked whether a map or a treaty definition of a boundary would prevail in law. Jessup at once responded that a careful examination of the facts should precede the formulation and application of principles of law. Such an examination took us both around the world. We flew in Thai helicopters to a base, and then climbed 1,500 feet on foot to examine the Temple of Preah

² C. BOHLEN, WITNESS TO HISTORY 1929-1969, at 281 (1973).

Vihear and its site. He withdrew from the case when elected to the Court, and disqualified himself from participating as a judge at the trial.

As the elections to the Court neared in 1960, various friends of Jessup, I among them, felt that he would be an outstanding candidate. The sitting American judge had been renominated by some other governments but was then 77 years old. The nominating process in the United States involves consultation with law faculties and the highest courts; the actual nomination is made by the members of the Permanent Court of Arbitration. Without referring to all who supported Jessup's candidacy, one might mention two who later became judges of the Court themselves, Richard Baxter and Stephen Schwebel. The United States National Group, perhaps partly in response to the active support of its member Bethuel M. Webster, unanimously nominated Jessup. In due course, Judge Hackworth stated that he would not stand again. The United States Government indicated support for Jessup's nomination, and he was duly elected by the Security Council and the General Assembly. He said at that time that he would not seek a second term, and felt that no one over 70 should stand. He himself was 64 when elected.

During his period on the Court, Jessup and I corresponded regularly and met in The Hague and New York, but we never discussed the *Temple* case, in which I became one of the trial counsel for Thailand. We did discuss the idea of using panels of the Court for the judicial settlement of disputes. Following up his ideas, I wrote a Note on this suggestion for the *Journal*.³ He was also interested in the idea of empowering national courts to certify questions of international law to the International Court, although he recognized that this would require a Charter amendment.⁴

In their portion of this memorial, his colleagues on the Court will probably consider his contribution to its jurisprudence, including his dissent in the *South West Africa Cases*. Consequently, I will merely say here that I deduced from his opinions and the questions he addressed to counsel that he desired the fullest possible factual background.

The United States and other governments looked to Jessup for consultation after he left the Court, as did several multinational corporations. He and I were associated as colleagues in several of these cases in an easy, pleasant relationship. Characteristically, a number of lawyers of different nationalities were involved. Thus, we had to analyze whether we would be drawn into presenting a theory for a case, or limited to being among a series of lawyers preparing opinions. We usually moved from the opinion-writing phase to the consideration-of-tactics phase, but Jessup was clear that he did not intend to appear as trial counsel before the International Court.

In the mid-seventies we were consulted by the Government of Turkey on various aspects of its controversy with Greece over the continental shelf

³ Hyde, *A Special Chamber of the International Court of Justice—An Alternative to ad hoc Arbitration*, 62 AJIL 439 (1968).

⁴ Jessup, *To Form a More Perfect United Nations*, 129 RECUEIL DES COURS 1, 18 (1970 I).

in the Aegean, and the effect of possible oil deposits there. Our work involved first a series of essays on various points of law put to us by our client. One of these was what attention the International Court would give to the principle of equity. Jessup concluded that the International Court, like its predecessor, would continue to resort to equity as part and parcel of any modern system for the administration of justice. Here he cited Wolfgang Friedmann's research, the *North Sea Continental Shelf Cases* and Hudson's study of the Permanent Court of International Justice.

We realized that there were a dozen or more lawyers retained by each side in this case. We ourselves engaged in consultation with our client and then negotiations with our Greek opponents. All this took us first to Turkey, and then to London and Bern. He and I withdrew when Greece filed an application in the International Court and Turkey decided not to appear. Our Turkish client, at the end of our association, expressed appreciation for Jessup's work, referring to "the wisdom of his approach and the depth of his scholarship."

In an earlier consultation, the Government of Guatemala asked our opinion on a river problem involving a boundary lake and the development of water power by El Salvador. Our task was to consider the rights of the upper riparian. Jessup insisted that our opinion cite and consider every Latin American treaty we could find. That one section of our 176-page typed opinion is entitled "The Tradition of Solution through Bilateral or Multilateral Agreement in the Americas." In our research we drew on the materials of New York University, including its 1959 "Research Project on the Law and Uses of International Rivers."

There were other consultations in which I was not involved. When the United States took the *Iranian Hostages* case to the Court, Jessup and Hardy Dillard as former judges were informally consulted by the State Department, and I became aware of their views through our correspondence.

In serving on several State Department advisory committees, and also as consultants for prospective litigation in the International Court, we were exposed to United States laws and regulations that might affect the availability of American lawyers and experts to act for a foreign government. We received helpful advice from the Departments of State and Justice, and also the assurance that we did not need to register as foreign agents, and thus subject our files of foreign government clients to possible examination by U.S. authorities. This experience, at Jessup's and Professor Richard Baxter's suggestion, I outlined in a Note.⁵

Involvement in public service was Jessup's way of life and it extended beyond his periods in the State Department and on the Court. At the end of World War II, he took an active role in the American Society of International Law and drew me into its substantive activities as well. In April 1948, he prepared for Ambassador Warren R. Austin a major address on the United Nations system, which he somewhat unhappily had to deliver

⁵ Hyde, *Foreign Agents' Registration: A Practitioner's Note*, 5 N.C.J. INT'L L. & COM. REG. 377 (1980).

himself when Austin was unavailable at the last minute. The speech explored the whole field of "Modes of Redress Other than War."⁶ Jessup as ASIL President and member of the Board of Editors of the *Journal*, and through his many contacts and conversations, moved the Society in the direction of contemporary conceptual thinking teamed with procedural elegance. In that period I myself chaired an Annual Meeting committee and tried to substitute dialogue for long prepared speeches.

During his entire professional life, Jessup gave of his time and energy to the Hague Academy of International Law. He was one of its original students, and twice a lecturer. Particularly important were his 1956 lectures on parliamentary diplomacy.⁷ He then was elected to the Academy's governing body, the Curatorium, and served on its committee to select lecturers. He suggested the idea of external conferences drawing together established teachers, judges and younger governmental officials, and students from the Third World. He developed the conferences with the help of his Columbia colleague Wolfgang Friedmann. In this I was involved in seeking funds from American foundations.

Jessup repeatedly emphasized the importance he attached to the Hague Academy as a truly international body for the study of law. On a ceremonial occasion at The Hague in 1972, he said:

[T]he Hague Academy of International Law is the institution known most widely throughout the world as the organ for the study and the teaching of international law which, in addition to the highest professional and scientific standards, has attained and maintains unexcelled qualities of impartiality and of universality in the composition of its directorate, its lecturers, its directors of research and its students. Despite the waves of increasing nationalism throughout the world, the Academy has maintained its genuinely international character and is recognized as a place where the representatives of the developing countries mingle with those from the older States for the exchanges of ideas and for intellectual stimulation.⁸

This estimate led him at about the same time to support the Hague Academy for the Nobel Peace Prize, which, however, it did not receive.

A word should be added about the Institute of International Law; he was elected an associate and then a member, as have been several of his American academic colleagues. Its resolutions are carefully prepared and documented. I have known it only as a visitor at its meetings before World War II, and as a reader of the *Annuaire* thereafter.

Jessup pointed the way toward the development of a modern law of nations. He saw, as a continuing strand in his work, a struggle "with the problem of the establishment of peaceful and orderly relations among nations."⁹ His

⁶ United States Mission to the United Nations Press Release No. 438, Apr. 23, 1948.

⁷ See note 1 *supra*. For the other lecture, see note 4 *supra*.

⁸ Quoted by Hyde in a presentation to the Ford Foundation (Nov. 15, 1974).

⁹ Jessup, *The Future of International Law Making*, in COLUMBIA LAW SCHOOL CENTENNIAL CONFERENCE VOLUME: LEGAL INSTITUTIONS TODAY AND TOMORROW 208, 215 (Monrad G. Paulsen ed. 1959).

writings and his opinions are among his monuments. But his career is also important in *how* he functioned. One remembers his humor and his genuine affection for his students. I have heard them speak of him with great fondness whenever we met, both at home and abroad. Thus, it is appropriate that the ASIL's moot court competition, involving students from around the world, should bear his name. He followed the yearly competition and I wrote to him at length about the regional rounds on which I sat as a judge.

Jessup felt that we must look to younger men and women to pursue the role of law in the peaceful adjustment of disputes. On the very day after he died, he was listed in a letter published in the *New York Times* as among a group of 40 distinguished international lawyers supporting the reestablishment by the United States of its adherence to the compulsory jurisdiction of the International Court. In my last letter to him at Christmas in 1985, I concluded that it was now up to the next generation to move along the things that had seemed important to us.

Finally, a word about his devoted wife, Lois K. Jessup, who after a career as a teacher and administrator provided her husband with physical support, as he himself became increasingly crippled. Both at home and at The Hague, she supported him with love and imagination. She died two days after he did.

IV.

*By Philip C. Jessup, Jr.**

When I first heard this account of my father's early motivation to take up international law I cannot remember, but it surfaces again, I believe, in the Columbia University oral history.¹ His experience in the trenches in France towards the end of the First World War was the key. He was in the infantry, carrying a light machine gun, and fought through a number of the terminal battles with the American Expeditionary Forces. Although he was shipped back at the end of the war as a West Point candidate, he mustered out at the earliest opportunity to resume civilian life and complete his undergraduate degree at Hamilton College.

Upon graduation, he turned down a Rhodes Scholarship to marry my mother and take up a promising position in a bank in nearby Utica, New York, her home town, but before long he enrolled at Columbia Law School. After a year, he transferred to Yale Law School to study under Professor

* Secretary and General Counsel, National Gallery of Art, Washington, D.C.

¹ For another account, see Jessup, *You in International Law*, in LISTEN TO LEADERS IN LAW 155, 157 (A. Love & J. S. Childers eds. 1963).

Borchard, one of the leading scholars of international law. This decision, we later came to understand, stemmed directly from his experience in the trenches. The pacific settlement of international disputes became a goal to which he was dedicated for the rest of his life.

Years later, in the summer of 1941, the Carnegie Endowment for International Peace commissioned my father to visit some of the leading universities in Latin America to report on their curricula in international law and diplomacy. Towards the end of the trip, my mother, together with Professor Ted Dunn (then on the Yale graduate faculty) and me, had taken a side trip to Paraguay while my father visited universities in southern Brazil. We were to join him again in São Paulo. When we arrived, our local host explained after some hesitation that there had been an accident the night before and that my father's plane had gone down short of the airport. No one knew where he was.

After some delay, we raced out by car to the edge of the city, where some survivors had just been reported. As we arrived, we saw my father down at the end of a dirt road walking haltingly towards us, supported by a group of police and forest workers. An ambulance was waiting and he was put into it. My mother got in the back with him and they sped off to the hospital.

Later we learned that my father, one other passenger (an American who worked for International Harvester) and a Panagra steward, who had dislocated his shoulder in the crash the previous night, had walked out through the jungle, battling the vines and underbrush, keeping up each other's spirits during their rest stops by singing songs, and blazing trees with my father's penknife as they went along. Finally, at dawn, they reached a forester's cabin and phoned for help. His companions were taken immediately to the hospital, but my father insisted on leading a search party back to the wreckage in hopes of saving some of the other occupants whose cries had echoed behind them when they left the night before. By the time they reached the site, however, the other crew and passengers had all perished. So when we saw him appear from the forest the next afternoon, it was in fact his second trip.

After my father had spent some time in a hospital in São Paulo for treatment of his legs and arms, battered from the trips through the jungle, we three boarded the S.S. *Brazil* for the 2-week journey back to New York. We got off once—the next day—in Rio de Janeiro, where, in a wheelchair, my father was presented by the Government of Brazil with a medal for bravery, the Official Ordem Nacional do Cruzeiro do Sul.

Nine years later—another memory—we were living on Hoban Road in Washington, D.C. My father was serving in the State Department as the first ambassador-at-large of the United States, appointed by President Harry S. Truman in part to relieve the President and the Secretary of State, Dean G. Acheson, of endless official trips abroad. It was a Sunday morning in the early summer when we heard on the radio that North Korean troops had crossed the border into the South. The phone rang immediately, and my father was summoned to a crisis meeting at Blair House, where the Trumans were living while the White House was being renovated. He hurried out the

front door towards the car, then turned back and ran upstairs to the bedroom. "What did you forget?" I asked. He held up a small booklet he had taken from the top of his bureau. "The UN Charter," he answered, as he put it in his pocket and drove off downtown.

Later that evening, when he had finally returned to our house, we listened together to the radio as President Truman spoke to the nation explaining the measures the United States was planning to propose in an emergency meeting of the Security Council (from which, as it happened, the Soviets were absent by reason of a temporary boycott). At the end of the President's remarks, the national anthem started to play and I reached out as usual to turn off the radio. "No," he said, "leave it on." So we sat together on the edge of the bed and listened to the "Star-Spangled Banner." And I learned something more about my father.

For the amateur observer such as myself, insights into character and motivation over a long career are difficult to discern. My father was an outgoing, socializing person who made friends easily. Over the years, many of his students from around the world—literally—seemed to feel a personal relationship with him, and have told me often how special their time with him had been. His thoughtfulness towards them, his dedication to his teaching, his wit and skill in explanation and in counseling them in their careers, are all well remembered; his students write to me even now about the years gone by.

When he left the International Court, my father and mother were able to spend more time in their much loved place in Norfolk, Connecticut. Since the early thirties, we had spent the summers there in the birch woods, but now they could live there the year round. He had time to join in town affairs and served, for example, on the first Norfolk Planning and Zoning Committee. For many years he also served each Halloween, with other resident members of the judiciary such as Justice Arnold Fraiman of the Supreme Court of the State of New York, on the judges' panel at the Norfolk Library to select the best jack-o'-lantern.

Above all, he loved the woods and the field in front of the house, to which over the years he brought a wonderful array of transplanted wildflowers, shrubs and trees. The place is called Birchfield. Not long ago, my cousin Phyllis Kellogg Hotz sent me a copy she had kept of this poem by my father.

To L.K.J. Easter 1950

Gray birch, my friends, how paradoxical you are—
Weak, brittle, bending in permanent deformity
When ice and snow assail you,
But as you die, and after death, inhabited
By all the seven devils of contrariness.
You break and start to fall, but twine your myriad tendrilled arms
In near inseparable embrace with others of your clan.
You are a clannish lot; you find your beauty in a grove
Scorning the solitary splendor of the wineglass elm

Who dominates a broad expanse of meadowland.
The triad glories of the sun, the moon, the stars,
Brook no envy in your clan—
The sunlight makes you white as snow along the hemlock edge;
You gleam like silver when the moon
Shines through your filmy canopy of leaves;
On starry nights you pick the starlight from the dark
And stand as gentle beacons through the wood.

I've reared your young, pruning and giving thought
To Nature's selectivity which aids the strong
And, free from humane promptings, cut the weak.
I fight against your hemlock enemy
Whose robust seedlings rise against your young.

You are the pioneers who march across the countryside.
If man departs and leaves his farm it soon is yours,
You crowd the orchard and the lilac hedge;
If man returns, you give him wood,
Responding quickly to his need for warmth,
But in the fire, as on earth, your life is brief.

EDITORIAL COMMENT

IN RE HERBERT REIS

The July '86 issue of this *Journal* contains a brief appreciation of the honor done to this country and profession by the election of the U.S. member, Professor Herbert Reis, to the second vice-presidency of the United Nations Administrative Tribunal.¹ We said, at that time, that the "election of Mr. Reis . . . is a significant recognition of his eminence as a legal scholar by the community of his peers."² Its significance is underscored by the difficulty any American has, nowadays, in being chosen for high office in any international group.

Shortly after the publication of this comment, the U.S. State Department decided not to renominate Professor Reis for a second term on UNAT, thereby effectively relinquishing the U.S. possession of the vice-presidency. Instead, a retired Washington lawyer is to be put forward who has little prior experience in public international law and organization but, apparently, close ties to the Republican Party. Reis, himself a lifelong professional diplomat, had served equally well as lawyer to UN ambassadors as disparate as George Bush, Andrew Young and Jeane Kirkpatrick. His replacement, presumably, will be elected, but can hardly expect to be voted a vice-presidency by his Tribunal peers.

This baleful incident dovetails alarmingly with another, recounted by Professor Oscar Schachter in his tribute to Professor Philip Jessup, in this issue. Jessup was chosen in 1955 by the members of the International Law Commission to fill the unexpectedly vacant U.S. chair. However, the State Department, still in the thrall of McCarthyism, indicated its lack of support and Jessup declined to serve.

Then, as now, the State Department was all too willing to sacrifice the prestige and interest of the country for the sake of ward-level partisan politics elevated to the plane of the international judiciary. The costs of this policy are especially compounded, in the Reis case, by the coincidence that the Administrative Tribunal is currently hearing many important cases arising from the extreme fiscal stringencies occasioned by Washington's policies. Reis was a fiscal conservative, as evidenced by his dissent in the matter of civil servants' repatriation allowances and related "vested" fiscal benefits.³ His views, nevertheless, were highly respected by his colleagues on the Tribunal and carried unusual weight. Under the circumstance, the same is unlikely to be true of his hapless successor.

As the national interest yields to such narrowly defined partisan interest, the administration's base of support in the international legal profession, already eroded by various law-defying policies, will needlessly suffer further attrition.

THOMAS M. FRANCK

¹ 80 AJIL 720 (1986).

² *Id.* at 721.

³ *Mortished v. Secretary-General of the United Nations*, Judgements UN Admin. Trib. No. 273, at 21-28 (1981).

AGORA: MAY THE PRESIDENT VIOLATE CUSTOMARY INTERNATIONAL LAW?

The essays in this section originated with an unusually provocative debate at the 1986 Annual Meeting of ASIL. That, in turn, had been provoked by the lengthy litigation before federal district and circuit courts in the *Fernandez-Roque* cases* testing the constitutionality of the continuing detention by executive fiat of certain Cuban Mariel refugees. Shortly after the Annual Meeting, Professor Charney prepared a paper that tried to clarify and answer some of the questions left unresolved by the panel, primarily: if international customary law prohibits indefinite detention without trial and conviction, under what circumstances is the federal executive branch (or the President) at liberty (in U.S. constitutional law and practice) to disregard that law? On receiving Charney's challenging piece, the editors invited Professors Louis Henkin and Michael Glennon to address Charney's questions. Each author was then shown manuscript copy of the others' drafts and given an opportunity to respond in footnotes. The results of this informal process are these essays.

T. M. F.

THE POWER OF THE EXECUTIVE BRANCH OF THE UNITED STATES GOVERNMENT TO VIOLATE CUSTOMARY INTERNATIONAL LAW

In its decision in *The Paquete Habana*,¹ the United States Supreme Court wrote that customary international law is part of the law of the United States to be administered by the courts, "where there is no treaty and no controlling executive or legislative act or judicial decision."² The U.S. capture of the foreign fishing vessels in question was determined to have violated customary international law protecting enemy fishing vessels in time of war, and the Supreme Court ordered that compensatory damages were due. The remedy was ordered, notwithstanding the fact that the capture was undertaken to enforce a presidential proclamation establishing a naval blockade of Cuba. The arguments of the Solicitor General and the Assistant Attorney General supporting the capture went unheeded.

Recently, the United States Court of Appeals for the Eleventh Circuit held that an action authorized by the United States Attorney General, even though it violates customary international law, is a "controlling executive . . . act" that overrides customary international law to be applied in that court.³ As a consequence, the customary international law prohibition on prolonged arbitrary detention was not available to the plaintiff Cubans who entered the United States in the 1980 "freedom flotilla" from Mariel harbor. The Supreme Court may now face the difficult question of determining the

* *Fernandez-Roque v. Smith*, 622 F.Supp. 887 (N.D. Ga. 1985), reviewed sub nom. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986).

¹ 175 U.S. 677 (1900).

² *Id.* at 700.

³ *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), reviewing *Fernandez-Roque v. Smith*, 622 F.Supp. 887 (N.D. Ga. 1985).

meaning of "controlling executive . . . act" as used in *The Paquete Habana*. The answer to that question will determine the extent to which the United States is bound under domestic law to abide by rules of customary international law.⁴

According to a strictly dualist point of view, absent statutory enactment, individuals, including the President, are not bound or benefited by customary international law; only the nation is bound or benefited in its international relations. The classic monist view holds that customary international law is integrated into the law of the United States. In *The Paquete Habana*, the Supreme Court seemed to have adopted the monist view.⁵ Since the President is bound by the Constitution faithfully to execute the law of the United States,⁶ the President may not violate customary international law.

While the literature on the issue appears to focus on the domestic legal issues, I would like to call attention to the international issue and the difficulty of juxtaposing the domestic and international legal systems. Virtually all domestic legal systems in existence today are highly developed institutions that fit the positivists' vision of proper legal systems. Thus, law is made and changed through formal processes that respond to demands placed on the government. In the case of international law, particularly customary international law, the formal structures are absent and change may not be made easily. Despite this difficulty, customary international law must reflect developments in international society through appropriate changes in the norms. As is true for all legal systems, this law is in flux constantly.

According to classical views of customary international law, that law is transformed when state practice and *opinio juris* change to reflect a new consensus in the international community. If a nation or a group of nations seeks to alter an established rule of customary international law, it must forge a new state practice and *opinio juris*. This development does not take place instantaneously; rather, it takes time. In order to effect that change, states interested in a new rule of customary law must take action that violates existing law and they must encourage others to do the same.⁷ Other states

⁴ This issue has begun to be addressed in the literature. See, e.g., Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321 (1985); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 460 n.61 (1972); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1567-69 (1984); Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 VA. J. INT'L L. 1071 (1985); Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS L.Q. 719 (1982); Panel on Authority of the United States Executive to Interpret, Articulate or Violate the Norms of International Law, Apr. 11, 1986, 80 ASIL PROC. (forthcoming).

⁵ Professor Henkin points out that subsequent developments have made the classification of the United States as monist or dualist not a simple matter. Henkin, *The President and International Law*, *infra* p. 930, 932. Even if customary international law is law of the United States, its enforcement through court action is not guaranteed. A court must have subject matter jurisdiction and there must be a cause of action. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 744 (D.C. Cir. 1984); and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁶ U.S. CONST. art. II, §3.

⁷ Some writers appear to take the view that custom may change without state practice through the adoption of United Nations resolutions or the taking of decisions at multilateral negotiations

that want to uphold the existing rule will treat the proponents of the new rule as violators of customary law and will seek to impose on them the sanctions that international law makes available. If the proponents of the new rule are successful, a new consensus of state practice and *opinio juris* will develop and those nations which had the audacity to violate customary law will be found to be behaving consistently with the law. If they are unsuccessful, their actions will continue to be viewed as violations of customary law, and they will continue to suffer adverse consequences as violators until they mend their ways.

Examples of this process can be drawn from many situations. I shall draw on the law of the sea. During a period in the early years of the 20th century, the distance seaward within which a nation could exercise sovereignty or any other form of sovereign rights was limited to a narrow band seaward from its coastline. The United States and many other states maintained that the limit was 3 nautical miles. Some states, particularly Chile, Ecuador and Peru, sought an expanded territorial sea of 200 nautical miles. They claimed this zone and sought to exercise rights in the area as territorial sea. Other states, including the United States, treated that claim as a violation of international law and a struggle followed. In the end, the international community agreed that a 200-nautical mile territorial sea violates international law. A maximum limit of 12 nautical miles is now established for the territorial sea.

During the same period, the United States sought to expand coastal state jurisdiction seaward by advocating the legal regime of the continental shelf. At the time of President Truman's 1945 Continental Shelf Proclamation, the regime of the continental shelf did not exist. No regime of automatic special coastal state resource rights in the seabed beyond the territorial sea had been articulated as a rule of customary international law. Absent, perhaps, historic rights, the law of the sea limited the coastal state's exclusive resource rights to the narrow band of territorial sea. The United States initiated a rather rapid development of a new rule of law by claiming rights in the resources of the continental shelf, acting pursuant to the claim, and obtaining the acquiescence and support of other interested states. Until there was sufficient state practice and *opinio juris* to establish the new regime, the United States was in violation of the relevant customary international law.⁸

by consensus or other demonstrations of strong support. While these events may contribute substantially to the development of customary law, I doubt that they can effect a change in the absence of state practice. See Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. (forthcoming, 1986).

⁸ It may be argued that there was a lacuna in customary international law due to the fact that previously there had been no positive state practice. According to this view, the United States did not violate a positive rule of international law when it claimed sovereign rights in the continental shelf. This view is hard to reconcile with the traditional views of the United Kingdom, the United States and other maritime states that coastal states were precluded by international law from claiming exclusive resource jurisdiction beyond the narrow territorial sea. There has been considerable debate over the question whether there can be a lacuna in international law.

The initiative and the process worked, and now U.S. sovereign rights in the continental shelf are in conformity with existing customary international law.

This process by which customary international law is changed takes place in all subject areas, even those which are more emotionally charged than the law of the sea. Thus, the customary international law of human rights developed as an increasing number of states sought to enforce their view on reluctant states that customary international law required them to treat their nationals and other persons subject to their jurisdiction in conformity with certain rules. Under prior international law, the exclusive sovereignty of the state prohibited foreign states from becoming involved in the treatment a state accorded its own nationals. Many changes in customary law are subtle, and not readily amenable to broad proclamations. This has been true, for example, in the law regarding the protection of human rights and compensation for expropriation.

These changes in customary international law often are aided by the adoption of resolutions, declarations and treaties that articulate the new rules. Only in the case of peremptory norms of international law (*jus cogens*) might it be argued that violation of the law is not a legitimate part of the legal process by which customary international law may be changed.⁹

States will rarely, if ever, admit that they have violated customary international law, even in order to change it. Rather, they will argue that their behavior is consistent with the traditional law, or that the law has already changed. Furthermore, the law may change so rapidly that the period of time during which the actor is in violation will be brief. Both of these points reflect the reality of the practice of international law, but they do not controvert the fact that to change customary international law, a nation often must violate it. The skillfulness of the state's arguments and the brevity of the violation may mitigate the adverse consequences of the violation, but they will not eliminate them, unless one holds that the law is indeterminate.

This process of claim and reaction is part of the system of customary

⁹ That some rules of customary law are peremptory norms is not completely settled. See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §331 Comment e (Tent. Draft No. 6, vol. 2, 1985). Nor are the consequences of such a classification clear. While Article 53 of the Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), UNTS Regis. No. 18,232, reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969), declares that treaties in violation of peremptory norms are void, no authority has established how a normal rule of customary law becomes a peremptory norm. Even more difficult is the question, pertinent here, how a peremptory norm may be changed. In the absence of an international legislature, one may reasonably assume that the normal processes of change, including breach, are required. Unless the community's views are consonant with those of the breaching state, that state will be faced with enormous resistance by the international community. See Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 3 n.9 and 19 n.81 (1985). Such resistance could include severe measures against the breaching state and, possibly, against the individual officials pursuant to universal criminal jurisdiction.

Some may take the view that, by definition, peremptory norms are fundamental, and thus unchangeable. The natural law theorists of the 16th and 17th centuries were also confident that they had identified the universal rules. Nevertheless, not all their rules have survived.

international law. If it did not exist, customary law might be static forever (or at least until an international legislature is established). Such a circumstance would be undesirable and destructive of international law. Accordingly, one of the assumptions upon which substantive customary international law has been built is that nations will violate it in the course of efforts to change it. Such a violation does not immunize the state from treatment as a violator, but the behavior must be considered as within this system of community law, not outside it.

How, then, does one mesh the formal structure of a domestic legal system with the community law structure of customary international law? In the international system, the United States must have the power to engage in the lawmaking process. This participation may involve actions that put the United States in violation of existing customary international law. If the executive branch is restrained by the rule that customary international law is domestic law of the United States and that it may not be violated, U.S. participation in the international system will be handicapped. The alternative solution that the executive branch has no domestic legal obligation to conform to customary international law is equally unpalatable and is contrary to the holding in *The Paquete Habana*.

Some writers maintain that the Executive is obligated under domestic law to conform to customary law, but may be exempted by statute only.¹⁰ Thus, a proposed violation would require the approval of Congress. In the *Garcia-Mir* case, the Eleventh Circuit found such combined action of Congress and the Executive sufficient to establish a controlling action that was determinative for some, but not all, of the issues before it.¹¹

If customary international law were static, or there were an international legislature capable of changing the law, a required congressional authorization whenever the United States sought to violate international law would be manageable. But in the present system, required congressional approval would place unacceptable obstacles in the way of U.S. participation in the international legal system. The evolution of the community law system would not be amenable to case-by-case authorization by Congress.¹² Just as the international system requires that the President be able to enter into executive agreements and, apparently, to terminate treaties unilaterally, so must the President have the unilateral power to enter into the international law-making process.¹³ The Supreme Court appeared to have assumed that this

¹⁰ Lobel, *supra* note 4, at 1130 (and not even then in the case of peremptory norms, *id.* at 1142); and Glennon, *supra* note 4.

¹¹ *Garcia-Mir v. Meese*, 788 F.2d at 1454.

¹² Professor Glennon is correct in writing (Glennon, *Can the President Do No Wrong?*, *infra* p. 923, 928) that rules of customary international law often do evolve slowly. But the focus of the instant issue is on the events that contribute to that evolution by providing the necessary state practice. Those events tend to be discrete and usually demand executive action within real time limits and an appreciation of specific factual circumstances more appropriate for executive consideration.

¹³ Professor Glennon argues, *infra* p. 926, that the power of the President to enter into sole executive agreements is limited to his plenary powers under the Constitution. I take a less rigid

power resides in the President when, in *The Paquete Habana*, it spoke of a "controlling executive or legislative act."¹⁴ Compared to making and terminating international agreements, this process is more subtle. Thus, it requires greater executive flexibility.

The plaintiffs and amicus in the *Garcia-Mir* case have argued that the Executive is bound under domestic law by customary international law unless the President officially declares that the United States no longer will be

view and recognize the fluid nature of the relationship, as in Justice Jackson's concurrence in the *Steel Seizure* case. In the absence of express and valid limitation by Congress, the President's authority in this area is tested by "the imperatives of events and contemporary responsibilities rather than abstract theories of law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 592, 637 (1952) (Jackson, J., concurring). It is the thesis of this paper that in the field of international law, in the absence of limiting constitutional provisions or valid congressional legislation, the practicalities require sole presidential authority.

Glennon asserts, *infra* p. 926, that the President's power to terminate treaties that have received the advice and consent of the Senate is limited by the terms dictated by the Senate. The RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), *supra* note 9, §339 Comment *a*, suggests that this matter is not settled. The only case that might have raised the issue, *Goldwater v. Carter*, 444 U.S. 996 (1979), produced a result that appears to leave the matter very much in the hands of the President. Nor does *Dames & Moore v. Regan*, 453 U.S. 674 (1981), resolve this matter. *Id.* at 681-82.

¹⁴ 175 U.S. at 700. Implicit in the use of the word "or" is the view that the President has authority in this area that he may exercise independently of Congress. As in all questions of the separation of powers between the President and Congress, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). In the area of foreign affairs, the President's authority is particularly strong, notwithstanding responsibilities held and exercised by Congress. As the Supreme Court has written:

[W]e are here dealing . . . with . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). Thus, it is perfectly consistent with Congress's power to define and punish offenses against the law of nations for the President to participate in the state practice that gives rise to that law of nations, especially prior to the enactment of a statute fixing the domestic law of the United States.

Implicit in the Court's language is the view that customary international law is not federal common law. Notwithstanding Professor Glennon's arguments, *infra* p. 925, the Supreme Court has not held that customary international law is included within federal common law. Such an inclusion is simply not possible. Common law is judge-made law. Customary international law is not judge-made law. The authority to develop customary international law rests with the international community, not with the courts. When the Supreme Court in *The Paquete Habana* allowed that a derogation from customary international law may be taken by a "controlling executive . . . act," it precluded the possibility that customary international law would be considered to be federal common law, for an executive act cannot control federal common law.

bound by it.¹⁵ This approach would permit the Executive to interact in the international system, but at a price. The President must squarely address the legal obligations of the United States and declare that they will be abrogated. Such direct abrogation would be extremely difficult. In fact, it would never be done. In the present international system, a state seeking a new rule of customary law justifies its actions by arguing that they are within the law. Even in the examples discussed above, no state asserted that it was violating existing law. To establish a new *opinio juris*, the strange circularity of customary international law requires states seeking to create a new rule to assert that their behavior is in conformity with, or is even required by, existing law. They use that assertion to coax other states to accept the new rule.

These observations suggest that there are several considerations that ought to be taken into account in a search for the appropriate solution to this debate over the power to take a "controlling . . . act." First, customary international law is law of the United States and is binding as such on all, including members of the executive branch.¹⁶ Second, the United States must have the power to engage effectively in the customary lawmaking process; this process requires that, from time to time, the United States break that law. Third, restrictions on those branches of the Government charged with conducting U.S. foreign relations that inhibit this function are not tolerable; members of the executive branch cannot be subject to enforcement as violators of domestic law if they are participating in the legitimate process of developing customary international law. Fourth, the authority of the executive branch to participate in legitimate customary lawmaking activities should not be so broad that, in fact, it is not bound by customary law in the domestic legal system.

Certainly, if congressional approval were given by statute for an action, that approval would eliminate any domestic law questions so long as there was no violation of the U.S. Constitution.¹⁷ Furthermore, violations of customary law by the President, in the face of a contrary statute, would be unacceptable. Even though an official declaration by the President might be appropriate, more flexibility in the Executive is necessary. That flexibility, however, should not extend either to all members of the executive branch or to all actions by high officials. A serious high-level determination should be required before an act in violation of customary international law is taken and the normal operations of domestic law are cut off. This could be accomplished if all members of the executive branch are obligated to abide by customary international law as law of the United States unless by legislation

¹⁵ *Garcia-Mir v. Meese*, 788 F.2d at 1454. Professor Henkin testified in support of the plaintiffs in the trial proceedings before the district court at the merits stage of *Garcia-Mir. Fernandez-Roque v. Smith*, 622 F.Supp. at 902. He appeared to me to support this view at the ASIL Panel, *supra* note 4. That support is now absent, *infra* pp. 934-37.

¹⁶ See *supra* note 5.

¹⁷ Lobel argues that the political branches have no power to violate peremptory norms of international law. Lobel, *supra* note 4, at 1130-31. But see *supra* note 9.

or presidential directive the contrary action is authorized.¹⁸ But I believe that such authorization does not necessarily require a declaration that the action constitutes a violation of existing customary international law so long as the mandated behavior is clearly understood. In the absence of legislation, however, the "controlling executive . . . act" would have to be the President's.¹⁹

Although the President has been able to delegate many of his constitutional powers to members of the executive branch, certain powers are nondelegable, such as the power to sign bills into law or to veto them.²⁰ The Supreme Court has recognized the special role of the President in the separation of

¹⁸ Professor Glennon argues, *infra* p. 928, that congressional approval should be required if the United States is to violate international law because a violation can give rise to adverse reactions by states. This argument shows a weakness in his fundamental assumptions about the role of Congress in international relations. Many perfectly legal actions by the executive branch in international relations may give rise to severe adverse international reactions. Should congressional approval be required in each such case?

Glennon would permit the President unilaterally to place the United States in the position of a persistent objector with respect to an evolving rule of customary international law. See *infra* p. 929. The record of states invoking this purported rule of international law demonstrates that the adverse impact on the objecting state will be as severe as if that state had, in fact, violated a rule of international law. Charney, *supra* note 9, at 11-16.

¹⁹ Professor Glennon, *infra* p. 928, suggests that my examples of the way international law develops actually support his view that before the President acts to violate a rule of international law, congressional approval is required. I disagree. The continental shelf example is decidedly on point. It illustrates the established practice with respect to presidential authority and the necessity for that authority. The Truman Continental Shelf Proclamation was issued unilaterally and without congressional approval, even though it violated customary international law when made. The authority of the President to do so went unchallenged. There is no question that the proclamation played a seminal role in the development of the regime of the continental shelf. Congressional legislation followed a long 8 years later, and then only after it became a serious issue in the 1952 presidential election and the regime of the continental shelf was established international law. If prior congressional approval had been required, the United States would not have been able to play the essential leadership role that it did, and its interests might not have been as well protected.

Glennon suggests, *infra* p. 927, that if the President alone could authorize acts in violation of international law, the resulting litigation would focus adverse publicity on the President. Such a focus would prevent the United States from dissembling or changing its policy. Assuming those options were appropriate, the contrary is more likely. Judicial inquiry would be extremely limited if the act of the President would be a sufficient defense. Furthermore, the President might maintain maximum flexibility for the United States by leaving the matter to subordinates. Thus, if challenged, he would have the options of denying the act and reversing policy. If actions by subordinates were legally sufficient or if legislation had been enacted, such options probably would be more difficult to effectuate.

²⁰ See *United States v. Nixon*, 418 U.S. 683, 704, 708 (1974). The Court has been required to determine whether the act was actually taken by the President. *Runkle v. United States*, 122 U.S. 543, 557 (1887).

In *Garcia-Mir*, 788 F.2d at 1455, the Eleventh Circuit asserted, without analysis, that the President could delegate the authority to violate customary international law and had done so in the instant case. Unfortunately, the one supporting authority cited is not apposite. It concerned a legislative delegation of domestic authority, and did not involve matters of international law. *Jean v. Nelson*, 105 S.Ct. 2992, 2998 (1985) (delegation by Congress of its authority over incoming undocumented aliens to the Attorney General). I know of no statute that purports to delegate the instant authority from the President to a member of the executive branch.

powers and his particular responsibilities in the conduct of United States foreign relations.²¹

The President's special status was addressed in the 1982 Supreme Court decision in *Nixon v. Fitzgerald*, which found that the President had "absolute immunity from damages liability predicated on his official acts."²² A key passage in that opinion discusses the special nature of the office and makes direct reference to the foreign affairs power, even though that power was not specifically in question:

The President occupies a unique position in the constitutional scheme. Article II, §1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States" This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed"; the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"; and management of the Executive Branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."²³

The unique status of the President was emphasized in a companion case where the Court held that the President's absolute immunity did not extend automatically to close advisers in the White House.²⁴ The same holds true for cabinet secretaries.²⁵

While the instant question does not focus particularly on the personal liability of government officials, it may be viewed as a question of immunity, or as a closely related question. A presidential decision to take action that would violate customary international law could be considered to give rise to the immunity of involved government officials and agencies from claims to enforce that law in U.S. courts. The policies set out above would support such specific immunity.²⁶

The President's special role in the United States Government, including the conduct of the nation's foreign relations, suggests that the President, acting alone, may have the authority under domestic law to place the United States in violation of customary international law.²⁷ The President sits at

²¹ See *Dames & Moore*, 453 U.S. at 682–83. ²² 457 U.S. 731, 750 (1982).

²³ *Id.* at 749–50 (citations omitted).

²⁴ *Harlow v. Fitzgerald*, 457 U.S. 802 (1982).

²⁵ *Id.*; and *Butz v. Economou*, 438 U.S. 478 (1978).

²⁶ The immunities of government officials from personal liability and from injunctive relief involve closely related policy analyses. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980).

²⁷ Professor Glennon, *infra* p. 927, relies on *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), to support his position. In fact, that is the clearest case in which the President's wide discretion in this area is acknowledged. Chief Justice Marshall addressed, in dicta, the question

the intersection of the domestic and international responsibilities of the United States. Other officers, such as the Attorney General, the Secretary of State and the Secretary of the Navy, do not have the same combination of domestic and international responsibilities that would permit them to authorize U.S. violations of international and domestic law in the circumstances under consideration here.²⁸

This interpretation of *The Paquete Habana* would best conform with that case and the system of separation of powers established by the Constitution. Requiring actual resort to the President when the United States is contemplating a violation of customary law in the absence of legislation makes likely a serious review of the domestic and international options and consequences. An additional requirement that the President declare an intention to violate customary law, however, would not be necessary. Thus, the President's actions would not be unduly restricted. Under this approach, decisions to violate the law would be limited, and in all other circumstances the rule of customary international law would prevail as the domestic and international law binding on the United States.

JONATHAN I. CHARNEY*

of the domestic legal effect of the violation of international law by the President. "This usage is a guide which the sovereign *follows or abandons at his will*; the rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him, without obloquy, yet *it may be disregarded*." *Id.* at 127 (emphasis added). Previously, Marshall had pointed out that the action taken in the instant case was that of the district attorney and not the President:

It does not appear that this seizure was made under any instructions from the president of the United States; nor is there any evidence of its having his sanction. . . . On the contrary, it is admitted, that the seizure was made by an individual, and the libel filed at his instance, by the district-attorney, who acted from his own impressions of what appertained to his duty.

Id. at 121-22. This fact appears to have been determinative of the Court's decision to annul the sentence of condemnation.

Chief Justice Marshall's words raise an additional issue. How much discretion does the President have to take actions that violate rules of customary international law? His plain words suggest that there are no limitations other than the risk of "obloquy." Recently, the Supreme Court has stressed the particular influence such "obloquy" has in the case of the President as distinguished from other officials. *Nixon v. Fitzgerald*, 457 U.S. at 758-59. Constitutional and statutory limitations on the President's conduct also may be applicable.

²⁸ In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 104-05 (1976), the Court distinguished between the specific expertise and interests that the Civil Service Commission may invoke to justify a decision, and the interests of the broader national interest, which might justify actions by the President. As a consequence, the Commission's determination to exclude all noncitizens from federal service was found to be invalid, notwithstanding the Commission's argument that the exclusion strengthened the President's hand in international treaty negotiations. *Id.* at 104, 116. The Court also distinguished between presidential decisions taken by an express command and those in which the President had acquiesced. *Id.* at 105, 110. See also the discussion of *Brown v. United States*, *supra* note 27.

* Of the Board of Editors.

CAN THE PRESIDENT DO NO WRONG?

When the President does it, that means that it is not illegal.

*Richard M. Nixon**

Customary international law is part of federal common law. Federal common law is binding on every executive branch official, including the President. Congress can by statute create a different rule, however, because federal common law is interstitial; it fills in gaps between statutes and gives way when an inconsistent law is enacted.¹ Consequently, with congressional authorization, the Chief Executive can disregard any norm of customary international law.² But in the face of congressional silence, he is required to respect a clearly defined and widely accepted³ norm of customary international law. I consider this position, elaborated in a recent article in the *Northwestern University Law Review*,⁴ to be most consistent with traditional separation-of-powers principles and also the soundest functional approach.

What if the President's action falls within the scope of his plenary constitutional powers? Would not an exercise of such a power as "sole organ"—variously termed exclusive, inherent, independent or implied—prevail as against any contrary assertion of authority? Suppose, for example, that under the facts of *The Paquete Habana*,⁵ the President had ordered the seizure of coastal fishing vessels,⁶ and suppose that that act lay within his plenary power as commander-in-chief; would his act not be legal?

The answer is that the question is tautological. As the question is posed, it answers itself: the exercise of a plenary power *by definition* is not susceptible of abridgment. The decision to recognize the People's Republic of China,

* Interview with David Frost, May 19, 1977.

¹ A judicial ruling that the Executive has violated a norm of customary international law finds that executive act *contingently* unconstitutional; if Congress approves the executive act, the contingency is fulfilled. This is different from a case in which the courts rule an executive act *absolutely* unconstitutional, as would be true, say, if a First Amendment violation occurred. For development of these concepts, see Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321, 325, 341-42 (1985).

² He may also disregard peremptory norms, although it might be noted that governmental violation of a peremptory norm would likely be unconstitutional in any event. I agree with much of Professor Lobel's article, *The Limits of Constitutional Power*, 71 VA. L. REV. 1071 (1985), but I regard his approach to peremptory norms as aspirational.

³ This formulation represents a paraphrase of the requirement set out in *The Paquete Habana*, 175 U.S. 677 (1900), that the norm be "a settled rule of international law [by] the general assent of civilized nations." *Id.* at 694.

⁴ See Glennon, *supra* note 1. See also Panel on Authority of the Executive to Interpret, Articulate, or Violate Customary International Law, Apr. 11, 1986, 80 ASIL PROC. (forthcoming).

⁵ 175 U.S. 677 (1900).

⁶ In fact, in *The Paquete Habana*, *id.*, the President ordered that international law be honored. The issue in that case was not whether the President could violate customary international law, but whether the military commander ordered to carry out the naval blockade of Cuba had acted in accordance with the President's order, which incorporated international law by reference.

for example, or the decision to pardon Richard Nixon, or the decision to land on the beaches of Normandy rather than Calais—these are all acts that fell within the President's sole constitutional powers. But what does that mean?

Although the term "plenary" is used frequently in the abstract, it in fact has relevance only in a specific context. Plenary power refers to the power of the President to act *even if Congress prohibits that act*. Put another way, the exercise of a plenary presidential power precludes Congress from acting.

We know, however, from the constitutional text that the President has no plenary power to act in violation of international law. Article I, section 8, clause 10 explicitly confers upon Congress the power to define and punish offenses against the law of nations. Congress in clear terms is directly empowered to prohibit violations of international law. It simply cannot be, therefore, that the Constitution gives the President plenary power to carry out an act that violates international law. An act of Congress that prohibits him from doing so will prevail.

Stated meaningfully, the question is: *do* the plenary powers of the President permit him to perform an act that violates a norm of customary international law? Because the power to prohibit violations of international law is lodged in Congress, the answer clearly is no. The President has no more power to violate international law in the face of a congressional prohibition than to coin money or to regulate interstate commerce or to exercise any other power set forth in Article I, section 8 of the Constitution in the face of a congressional prohibition.

"Plenary," in short, does not mean "unlimited." A plenary power ends where a power of Congress begins. Because the power of Congress includes the power to prohibit any—or all—offenses against international law, if Congress does so, its law binds the President. The President therefore could not have plenary power to seize coastal fishing vessels in violation of customary international law. Nor would the President have plenary power to abrogate the United Nations Charter or to mine the harbors of Managua: the norm of *pacta sunt servanda* and the principle of proportionality are both widely accepted and clearly defined rules of customary international law.

But it does not follow, one may object, that the *courts* might properly prohibit him from doing such things. After all, the powers enumerated in Article I, section 8 of the Constitution are powers conferred on Congress, not on the judiciary. For the courts to so bind the Executive, it might be argued, would be to usurp the powers of Congress.

An especially illuminating discussion of the courts' constitutional authority to act in Congress's stead is contained in Professor Henkin's classic work, *Foreign Affairs and the Constitution*. That discussion appears, in fact, under the heading "Judicial Legislation."⁷ And legislating is precisely what the courts do when they prescribe rules of customary international law. Analyzing the "legislative power of the federal courts,"⁸ Henkin notes that federal

⁷ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 216 (1972).

⁸ *Id.* at 219.

courts have "made"⁹ law relevant to foreign affairs. In the subsequent section, concerning customary international law, he observes that international law is part of the law of the United States.¹⁰ An earlier draft of the revision of the *Restatement of Foreign Relations Law of the United States* saw no problem in denominating customary international law as federal common law:

International law was part of the common law of England and as such of the American colonies. With independence, it became part of the law of the thirteen states. When the United States came into existence, international law became part of the common law also for the courts of the United States wherever courts applied common law.¹¹

This reference to "common law" was dropped, however, and subsequent drafts have stated that customary international law is "like" federal common law.¹² Professor Henkin elsewhere has said that he views customary international law as *sui generis* for domestic purposes.¹³

The rationale for a fundamental, new category is far from convincing. "Common law" has long been viewed as comprising judge-made law, as embracing all law save statutes and constitutions. Predictability in the law is better advanced by sticking with basic categories we already have and bur-nishing existing rules, rather than by creating new categories to which in-determinate rules apply. The justification for a new category appears to turn primarily on the argument that a judge who applies a customary international law norm "finds" rather than "makes" law, a distinction that seems tenuous. In *Erie Railroad v. Tompkins*,¹⁴ the Supreme Court rejected the proffered distinction, which had been relied upon by the judiciary in the era of *Swift v. Tyson*¹⁵ to justify broad lawmaking power by the courts. Applying it, a judge who selects Rawls as a rule of decisional authority—or Posner or Ely or George Gallup, for that matter—is supposedly engaged in a more re-strained exercise than one who selects Brownlie. One need not be a legal realist (or whatever they are called today) to see that that distinction under-states the breadth of discretion inherent in judicial decision making. Moreover, if it is indeed correct that judges applying customary international law rules are somehow "less free to follow their own bent,"¹⁶ that would seem to suggest that a judge should feel even less restraint in applying such a rule to the Executive; the judge is not, after all, creating a new rule out of whole cloth, but rather is applying a known, identifiable rule in circum-stances where its application was foreseeable.

Whatever the vocabulary—whether customary international law is de-nominated as federal common law or something else—the policy consid-erations raised in its domestic incorporation are the same. So is the history

⁹ *Id.* at 218.

¹⁰ *Id.* at 221.

¹¹ RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) [hereinafter cited as RESTATEMENT (REVISED)] §40 (Tent. Draft No. 1, 1980).

¹² *Id.* §131 Comment d (Tent. Draft No. 6, vol. 1, 1985).

¹³ See ASIL Panel, *supra* note 4; deposition of Louis Henkin, *Fernandez-Roque v. Smith*, Civ. No. C81-1084A, June 13, 1985.

¹⁴ 304 U.S. 64, 79-80 (1938).

¹⁵ 41 U.S. (16 Pet.) 1 (1842).

¹⁶ L. HENKIN, *supra* note 7, at 217.

of that process: many times since *Erie*,¹⁷ federal courts have applied their own rules—court-made rules, not statutes—to acts of the Executive.¹⁸ In this application those rules have been accorded the same legal weight as acts of Congress. Indeed, it would be difficult theoretically *not* to view court-made rules as supreme. As Professor Henkin has put it, "In principle, any authority exercised by the courts under their own constitutional authority ought to be equal to the authority of Congress or of the treaty-makers, and their 'enactments' entitled to equal weight. . . ." ¹⁹ The justification for such judicial lawmaking may or may not be persuasive—as Henkin has written, the constitutional basis has been less than clear²⁰—but the argument against it is an argument against 200 years of practice—and one, I think, in which the burden is on the challenger.

As for Professor Charney's approach, the tautological problem outlined above suffuses his analysis. He goes to some lengths to establish an independent presidential power to take steps that violate customary international law, arguing that the Executive, and the Executive alone, must have the power to change that law by violating it. The problem is, however, that Charney acknowledges—as he must—that this allegedly plenary presidential power is not plenary after all, but is subject to congressional limitation. "[V]iolations of customary law by the President," he writes, "in the face of a contrary statute, would be unacceptable."²¹ The power to place the nation in violation of a customary norm, in other words, does not reside in the President alone.

This is a fatal admission. It establishes that the President's power to place the nation in breach of customary international law is subject to limitation. That power therefore is *not* like the power of the President to enter into a sole executive agreement, which in any event may deal only with a "matter that falls within his independent powers under the Constitution."²² (The power to terminate a treaty is not an exclusive presidential power; a treaty can be terminated by the President alone only "in accordance with its terms"²³—i.e., only if the termination is not prohibited by the Senate.²⁴)

Recognition that no plenary power inheres in the Executive to breach customary international law also removes any rationale for giving subordinates immunity. The relevance of immunity law is unclear to begin with, inasmuch as immunity attaches only in circumstances that would otherwise give rise to personal liability, something not at issue here; the question of immunity arises in a different factual context and triggers different policy

¹⁷ *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

¹⁸ For examples, see Glennon, *supra* note 1, at 348.

¹⁹ Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1563 (1984).

²⁰ L. HENKIN, *supra* note 7, at 216.

²¹ Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, *supra* p. 913, 919. Professor Charney, of course, would not give effect to a statute which otherwise violated the Constitution, as I would not. *Id.*

²² RESTATEMENT (REVISED), *supra* note 11, §303(4) (Tent. Draft No. 6, vol. 2, 1985).

²³ *Id.* §339(a).

²⁴ See generally Glennon, *Constitutional Issues in Terminating U.S. Acceptance*, in THE INTERNATIONAL COURT OF JUSTICE IN THE FIFTH DECADE (forthcoming, 1986).

questions.²⁵ The central point, however, is that the Chief Executive cannot give what he does not have: *no one* in the executive branch has the authority to breach customary international law in the absence of congressional authorization. As indicated above,²⁶ *The Paquete Habana* provides no support for exempting the President.²⁷ The assertion that executive officials acting in violation of customary international law should be seen as cloaked in something "like" immunity is therefore reduced to a conclusion, not an argument.

The contention that acts ordered or performed by the President personally should be removed from judicial scrutiny has its roots in antiquated notions of sovereign immunity—the notion that the king can do no wrong.²⁸ Its transposition to this context would place the President above the law, a proposition consistently rejected from *Marbury v. Madison*²⁹ through *United States v. Nixon*.³⁰ As a practical matter, moreover, the scheme could undermine the very goals it seeks to advance. Under facts such as those presented in *Fernandez-Roque v. Smith*,³¹ to take a typical example, the President might well wish to avoid public identification with the policy. It would be politically desirable at the outset to have a subordinate "take the heat" for what obviously would be a controversial act. Direct personal involvement by the President becomes legally necessary, however, once that policy is challenged in court. Then, assuming that the Executive is to prevail in litigation defending his program, the President must personally endorse the act—at precisely the moment that maximum public attention is focused on the issue of its permissibility under international law. A procedure so mechanical with effects so rigid hardly conduces to either presidential flexibility or diplomatic agility.

This is, in any event, a question of power, not immunity. The governing law is provided by the separation-of-powers doctrine.³² Some insight may be gleaned, therefore, by examining exactly why the Constitution does *not* place the power to breach international law in the Executive alone.

Violation of international law may cause the nation to incur serious costs. Some are intangible: the international "obloquy" alluded to by Chief Justice Marshall in *Brown v. United States*³³ represents one level of cost. A nation seen in the international community as a lawbreaker can receive the treatment of a lawbreaker. Other costs are more tangible. The draft *Restatement* recognizes the right of a state victim of an international violation by another

²⁵ Certain immunity cases, however, do illustrate the point made above that court-made rules have been applied to executive branch officials. See, e.g., *Barr v. Matteo*, 360 U.S. 464 (1959).

²⁶ See *supra* note 6.

²⁷ For elaboration, see Glennon, *supra* note 1, at 338–39.

²⁸ For a discussion of the origins of sovereign immunity, see E. HENDERSON, *FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW* (1974).

²⁹ 5 U.S. (1 Cranch) 137 (1803).

³⁰ 418 U.S. 683 (1974).

³¹ 622 F.Supp. 887 (N.D. Ga. 1985).

³² See generally Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. REV. 109 (1984).

³³ 12 U.S. (8 Cranch) 110, 128 (1814).

state to resort to countermeasures that might otherwise be unlawful.³⁴ The international community can also impose economic and diplomatic sanctions upon lawbreakers. Those sanctions can be severe, including monetary damages, trade embargoes, and prohibitions against arms sales, diplomatic relations and recognition, and financial and other assistance.³⁵ The decision to risk or to incur such sanctions could have a sweeping impact on the life of the entire nation. In addition, the decision could directly implicate the powers of Congress, including the appropriations power, the power to regulate commerce with foreign nations and the power to declare war.³⁶ To permit such costs to be incurred through the judgment of the Executive alone would be at odds with fundamental tenets governing the distribution of powers within the federal system.

Viewed functionally, permitting unilateral executive action would yield little benefit. International law already makes sufficient allowance for a state's need to act swiftly to meet an emergency. In addition to the right to take necessary and proportionate countermeasures in response to a violation of international law, as noted above,³⁷ a state has the right to use armed force in individual and collective self-defense.³⁸ It is therefore difficult to hypothesize exigent circumstances of a sort that would require presidential action before Congress has time to act. Rather, the more typical situation in which a violation might be desirable is precisely the sort described by Professor Charney in his discussion of the evolution of customary norms concerning the law of the sea—a situation that permits the collective, deliberative reflection of which a legislative body is capable. Changes in customary international law ordinarily involve many acts by many states, carried out over an extended period of time. The result may be a gradual alteration of existing norms, or it may be a series of acts that fall short of a new custom (or lack *opinio juris*) and thus represent violations. But the point is that the process normally is gradual. Participation in that process thus admits of little need for sole executive action. To the contrary, whether the nation should run the risk inherent in *failing* to change the norms it aims to change—the risk of incurring international sanctions—is a decision suited more to the institutional strengths of Congress.

It is hard to see how the distribution of authority I have outlined could have any appreciable effect on the exercise of legitimate executive “flexibility.” An Executive indifferent to international law or unable to make a persuasive case for its violation could face constraints. But that is as it should be. Flexibility is not the only value that the Constitution seeks to uphold; the President of the United States is not a Sun King. Flexibility, like convenience and efficiency, does not eclipse other important constitutional val-

³⁴ RESTATEMENT (REVISED), *supra* note 11, §905 (Tent. Draft No. 6, vol. 1, 1985).

³⁵ Glennon, *supra* note 1, at 360.

³⁶ For reasons such as these, the Executive has long followed the practice of securing Senate or congressional consent before entering into arbitral agreements that would subject the United States to real or potential monetary liability. See Glennon, *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 AJIL 682, 684 (1985).

³⁷ See *supra* text at note 34.

³⁸ See UN CHARTER art. 51.

ues.³⁹ Even more vital to the Framers' scheme was the value of *process*—the notion that *how* a decision is made can be as important as the substance of the decision itself. Charney knows this, of course, writing as he does that flexibility should not extend to "all actions by high officials";⁴⁰ that "customary international law is law of the United States and is binding as such on all, including members of the executive branch";⁴¹ and that the "solution that the executive branch has no domestic legal obligation to conform to customary international law" is "unpalatable."⁴² Yet somehow that wisdom evaporates when the time comes to formulate a conclusion, his being that the President, acting alone, should be able at any time, for any reason, to breach any customary norm or to permit his subordinates to do so—regardless of the international consequences. The primary reason presented for this extraordinary power—the President's "special role" in the United States Government, "at the intersection of the domestic and international responsibilities of the United States"⁴³—applies at least equally to Congress, which surely exercises a "combination of international and domestic responsibilities" on a par with the Executive's. If it is imperative that the United States violate customary international law, then the President should have no difficulty in persuading Congress that it is in our national interest to authorize that violation. If he cannot persuade Congress, then the United States should continue to honor international law.

Despite Professor Charney's acknowledgment that the presidential power at issue is not plenary, he seems nevertheless to believe that it is only under executive direction that the United States participates in the process by which customary norms are changed. This simply is not so. The courts, Congress and the Executive all partake in the process of customary law formation and transformation; a norm of customary international law reflects the acts of all three branches.⁴⁴ *The Paquete Habana*, in its time, surely constituted evidence of customary law concerning the seizure of coastal fishing vessels. Congressional legislation concerning human rights, enacted in the 1970s, surely contributed to the development of human rights norms, such as the customary prohibition against prolonged arbitrary detention.

This does not mean that the President can *never* act alone. The Executive, for example, may indicate its dissent while a customary rule is being developed. That nascent rule, should it develop into a customary norm, would then have no application to acts of the United States, either internationally or domestically.⁴⁵ This measure of discretion is permitted because, at the time the Executive objects, the rule is not yet part of customary international

³⁹ See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

⁴⁰ Charney, *supra* p. 919.

⁴¹ *Id.*

⁴² *Id.* at 917.

⁴³ *Id.* at 921-22.

⁴⁴ See Art. 38(1) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, TS No. 993, providing that the Court in resolving international law disputes shall apply "general principles of law recognized by civilized nations" as well as "judicial decisions . . . of the various nations."

⁴⁵ RESTATEMENT (REVISED), *supra* note 11, §102 Comment *d*, at 19, 39 (Tent. Draft No. 6, vol. 1, 1985).

law, and a fortiori not yet part of federal common law, thus lacking wide acceptance and perhaps even clear definition.

There is little reason to believe, therefore, that the modest limitations imposed by this approach would handicap U.S. participation in international law formation or any other diplomatic arena. The urgent need today is that international law and international institutions be strengthened, not further eroded. In this task, federal courts have a role to play; not *the* role—Congress has the last word—but *a* role. Acting without congressional consent, the President does not have the constitutional power to breach a clearly defined and widely accepted norm of customary international law. It is within the constitutional power of the courts to order any such violation stopped.

MICHAEL J. GLENNON*

THE PRESIDENT AND INTERNATIONAL LAW†

In *Garcia-Mir*, the district court found that prolonged detention of the undocumented aliens was, in the circumstances, "arbitrary," and therefore a violation of international law.¹ But it also held that even though it was in violation of international law, the courts would not order an end to the detention because it had been authorized by the Attorney General. The court of appeals affirmed.²

For that conclusion both courts relied on the famous statement of the Supreme Court in *The Paquete Habana*.³ There the Court said:⁴

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . .

* Of the Board of Editors.

† These pages are a summary of a more extensive treatment of this subject in a larger context, to appear in the Centennial Issue of the *Harvard Law Review* (February 1987).

¹ *Fernandez-Roque v. Smith*, 622 F.Supp. 887 (N.D. Ga. 1985). The court cited the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 (Tent. Draft No. 3, 1982). 622 F.Supp. at 903 n.30. That prolonged arbitrary detention as state policy is a violation of customary law is reaffirmed in the Tentative Final Draft of the *Restatement*, 1985 (hereinafter cited as RESTATEMENT (REVISED)).

² *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986).

³ 175 U.S. 677, 700 (1900).

⁴ The Court also said: "This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter . . ." *Id.* at 708. The term "public act" is not defined. And while it is clear that a treaty would ordinarily supersede customary law as the applicable international law between the parties (see RESTATEMENT (REVISED) §102 Comment j and Reporters' Note 4), the Court does not explain why a "public act" of the United States, and what kind of public act, would relieve its court of its obligation to give effect to customary law as the law of the land.

The qualification, "where there is no treaty, etc.," was dictum. The Supreme Court did not cite any authority for that dictum. It did not explain why international law, as the law of the land, would not be given effect when there was a "controlling legislative or executive act"; it did not explain whether every legislative or executive act would be controlling, or which legislative or executive acts were controlling for the purpose.

We can only speculate as to what the Court meant. I suggest what it might have meant, or should have meant.⁵

I.

The governing principles are not difficult to state; they are less easy to apply. In principle, every state has the power—I do not say the right—to violate international law and obligation and to suffer the consequences. That power is not denied by the international political system;⁶ to my knowledge, it is not denied to any state by its own constitution.

The United States Constitution does not address that question explicitly. I think it would be foolish—and futile—to attempt to construe the Constitution as forbidding the Government of the United States to violate international law. The courts, I am satisfied, will not treat an act of government that puts the United States in violation of international law as, *ipso facto*, an act in violation of the United States Constitution.

The Court has so said, and has so held repeatedly. In the *Chinese Exclusion Case*,⁷ the Court upheld an act of Congress that was inconsistent with a treaty with China. The Court said:

The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts. This subject was fully considered by Mr. Justice Curtis, whilst sitting at the circuit . . . and he held that whilst it would always be a matter of the utmost gravity and delicacy to refuse to execute a treaty, the power to do so was prerogative, of which no nation could be deprived without deeply affecting its independence . . . This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct.

A different question is how that "prerogative" may be exercised in our constitutional system. The federal Government is a government of enumerated powers, and each branch of government has only the powers al-

⁵ It is not clear to me that the Court was in fact pronouncing on hierarchy or conflict between international law and other United States law, but the dictum has been so construed and I address it accordingly.

⁶ International law gives "specific performance" or restitution as a remedy only in limited cases. And political enforcement of international law is available in principle only through the UN Security Council (subject to veto), and only for violations that threaten international peace and security.

⁷ 130 U.S. 581, 602-03 (1889). The Court was addressing the prerogative of a state to violate its treaty obligations, but there can be no doubt that the prerogative extends as well to violating an obligation under customary law. Indeed, by enacting a statute that compelled the United States to violate a treaty obligation, Congress was causing the United States to violate the principle of customary international law, *pacta sunt servanda*.

located to it. No branch of government is given a power to violate international law, as such. But any act within the authority of a branch of the Government under the Constitution is valid as law of the United States and will be given effect by the courts. The question is whether such an act will be given effect if it would put the United States in violation of international law.

That raises a series of questions: the relation of United States law to international law; whether international law is law of the United States; if so, where it stands in the hierarchy of United States law. The Supreme Court has never considered, in theory and in principle, where the United States stands on the "monist"-"dualist" spectrum. It is accepted that both customary law and treaties are law of the United States—treaties by express reference in Article VI of the Constitution, customary law without any express "incorporation." The place of international law in the hierarchy of United States law, however, has been largely established for treaties but hardly for customary law.

Not by reference to any theory, but principally by construction of the Supremacy Clause of the Constitution, the Supreme Court has established that treaties are subordinate to the Constitution. Therefore, a provision of a treaty cannot be given effect as law in the United States if it is inconsistent with the Constitution.⁸ Also, a treaty and an act of Congress have the same status in United States law, and in case of conflict between treaty and statute, the later in time prevails.⁹ Therefore, those obligated to enforce the law—the Executive and the courts—are constitutionally obligated to give effect to a treaty provision even in the face of an earlier act of Congress, and to an act of Congress even in the face of an earlier treaty provision. The latter principle has sometimes been described—not quite accurately—as reflecting power in Congress to repeal a treaty as well as a power in Congress to violate international law. However characterized, the result is established as law in the United States. A treaty will not be given effect in the face of a "controlling," i.e., a later, act of Congress.

The Court built its jurisprudence by construing the Supremacy Clause, but, by implication at least, it placed the United States somewhere in the "dualist" camp. In the United States, international law is not supreme; it is inferior to the Constitution. The international obligation to carry out treaty obligations is supreme only in relation to prior domestic law, but will not be given effect if an act of Congress supervenes.

The place of customary law in the hierarchy of United States law has never been expounded by the Supreme Court. The Court has accepted that customary law is part of the law of the United States,¹⁰ but it has not con-

⁸ *Reid v. Covert*, 354 U.S. 1 (1957). See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 137-40 (1972).

⁹ *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

¹⁰ *The Paquete Habana* is only the most famous statement. Much earlier, Marshall said: "Till such an act [of Congress] be passed, the Court is bound by the law of nations which is part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

sidered whether a principle of customary law is subordinate to the Constitution, or where a principle of customary law stands in relation to a treaty or an act of Congress.

Whether customary international law is subordinate to the Constitution is an academic question, not having arisen in 200 years. In principle, however, it is commonly assumed that, like a treaty, a principle of customary international law cannot be given effect in the United States if it is inconsistent with the Constitution.¹¹ Assuming that customary international law is subordinate to the Constitution, where does it stand "subconstitutionally"? Is it equal to a treaty in United States law? Is it—as a treaty is—equal to an act of Congress?

The equality of treaties was derived by the Supreme Court by construction of the Supremacy Clause.¹² Customary law is not mentioned there. The argument has been made that since customary law is "common law," it is—as other common law—inferior to statutes and cannot be given effect if inconsistent with an act of Congress, whether the act is prior or subsequent. I think that argument is misconceived. Customary international law is *like* common law in that it is unwritten and that the courts determine it without reference to any text. It is not like common law in any of the respects that determine that domestic common law is inferior to legislation.¹³ Indeed, there are plausible arguments that the Framers accepted customary law as binding on the United States, including Congress, and that it was intended to be of higher status than the laws of Congress in the domestic legal hierarchy.

In the end, I think, the courts will probably conclude that customary law, being equal to treaties in international law, has the same status as treaties in the domestic legal hierarchy as well. And since the Constitution has been read to mean that treaties and statutes are equal, customary law—now read into the Supremacy Clause and treated as law of the United States for other constitutional purposes¹⁴—should be put on the same level as treaties and statutes. If so, like a treaty, a principle of customary law will not be given effect if supervening national legislation is inconsistent with it. But a supervening principle of customary law will not be denied domestic effect because of some earlier act of Congress.

The national prerogative to violate international law, as reflected in the power of Congress to enact laws inconsistent with a treaty obligation, was established a dozen years before *The Paquete Habana*. I think it plausible to read Justice Gray's reference there to "a controlling legislative act" as extending the same principle to customary law. If Congress enacts legislation

¹¹ See RESTATEMENT (REVISED), *supra* note 1, §131 Comment *a*. This might be supported by reference to the Supremacy Clause, if international law is accepted as among the "laws of the United States" which must be "pursuant to" the Constitution. See note 14 *infra*.

¹² See *Whitney v. Robertson*, 124 U.S. 190 (1888).

¹³ See Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984).

¹⁴ See RESTATEMENT (REVISED), *supra* note 1, §131 Comments *d* and *e* and Reporters' Note 2.

that is inconsistent with, and causes the United States to violate, an established principle of customary law, the Executive and the courts are obliged to give effect to the act of Congress.

II.

Why a "controlling executive act" should permit—or require—the courts not to give effect to customary law, and what kind of act would be "controlling" for this purpose, are more complex questions. The complexity derives from the fact that the President wears two very different hats. His "executive power" requires him to take care that the laws be faithfully executed. (Article II, section 3.) But he also has independent substantive constitutional authority, as treaty maker, as "sole organ" in foreign affairs, and as commander-in-chief. Acts within that constitutional authority may have effect on the law of the United States; they may themselves make law and have effect as law in the United States.

Those principles, I believe, govern the present issue. The President's duty to take care that the laws be faithfully executed includes not only statutes of Congress and judge-made law, but also treaties and principles of customary law. As with any other law, however, the President need not take care that international law be faithfully executed if (1) it has ceased to be law, or (2) it is superseded by some other law and it is his duty to execute the superseding law.

1. The President need not, cannot, execute a treaty or a principle of international law if it has ceased to be law binding on the United States. Thus, the President will not execute a treaty that is void or, being voidable, has been voided; or a treaty terminated by the lapse of time, by operation of law, by repudiation. If that occurs, the President has no duty, indeed no right, to take care that the treaty be faithfully executed. There is no longer any treaty. Similarly, while a principle of international law cannot be terminated by sole action of any state, it can be abandoned by states generally, or be replaced by a new principle of law, or—as between particular states—be superseded by a treaty between them. If any of these occurs, the original principle is no longer customary international law, and therefore no longer law of the United States for the President to enforce.

When a treaty or a principle of law terminates as a result of circumstances, or of an action by another state, it ceases to be an international obligation for the United States, and ceases to be law in the United States. There, no action by the President is involved and no question of presidential power arises. But a treaty or a principle of law can be terminated or modified also by action of the United States, and the authority to take such actions on behalf of the United States lies in the President. I think the President, as "sole organ," has constitutional authority to terminate a treaty, whether in accordance with or in violation of its terms.¹⁵ When the President terminates a treaty, it is no longer law of the United States, and neither the President nor the courts will give it effect.

¹⁵ See *id.* §339.

The same is true when the President, acting within his authority as sole organ, does something that has the effect of terminating or modifying a principle of international law—as by making an agreement with another state that supersedes customary law, or joining with others to abandon a principle of customary law or to create a new principle to replace the old.

In either case, I stress, the constitutional question is not whether the President has authority to violate international law; the question is whether he has constitutional authority to do the act that terminated the treaty or superseded the customary principle. The elimination of the treaty or of the principle of customary law from the law of the United States follows.

2. The President need not, may not, execute a principle of international law or a provision in a treaty if it is superseded in United States law by another law that has higher or equal status. Thus, the President will not execute a treaty or customary principle that conflicts with the Constitution. The President will not execute a principle of international law if it is superseded by an intervening treaty provision or a new principle of international law. Under established doctrine, he may not execute a treaty provision if it is superseded by an intervening act of Congress and, as indicated, the same principle would probably apply to require the President to give effect to an act of Congress that is inconsistent with a preexisting principle of customary law.

A case can be made also that, in some cases, the President can supersede a principle of international law or a treaty by law made under his own authority, in those special circumstances when the President has constitutional authority to make law in the United States. For example, the courts have found that he has such “legislative authority” to determine sovereign immunity.¹⁶ Legislative effect has been given to executive agreements incidental to the President’s power to recognize governments, as in the Litvinov Assignment of 1933, and to agreements to settle international claims, as in the Iranian hostage accord of 1980.¹⁷

The President—and the courts—then will not give effect to international law or a treaty if they are no longer law or are superseded by other law of higher or equal status. In addition, the argument is made that the President may violate a treaty or principle of international law in some cases. It is argued that, in his conduct of the foreign relations of the United States, the President may decide that it is in the interest of the United States to take some action without regard to international law, e.g., to overfly foreign territory without the state’s consent, bring down a foreign airplane, violate a diplomat’s immunity. Such acts, contrary to international law, do not ordinarily impinge on international law incorporated as domestic law in the United States. In any event, it is arguable that the courts should not enjoin such a violation; they should recognize the “prerogative” of the United

¹⁶ *Ex parte Peru*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). See L. HENKIN, *supra* note 8, at 56.

¹⁷ *United States v. Belmont*, 301 U.S. 324 (1973); *United States v. Pink*, 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

States to do that, and the power of the President to do that for the United States in the exercise of his constitutional authority.

I stress "in the exercise of his constitutional authority." As I see it, the President has no power—as such—to violate international law, just as he has no power—as such—to repeal a treaty or a customary principle as law of the land. But acting within his constitutional authority, the President may take actions that have the effect of ending an international obligation of the United States with the result that the obligation is no longer law in the United States. Acting under his constitutional powers, the President can make limited law in the United States, which would supersede a treaty or principle of international law. Perhaps, an act of the President (inconsistent with a principle of international law) that does not purport to make law in the United States will not be enjoined by the courts, if the act is within the President's constitutional authority as sole organ or as commander-in-chief.¹⁸

A presidential act that terminates the obligation of the United States and therefore its place in the law of the United States, or a presidential act that makes law in the United States and supersedes a principle of customary law as United States law, is a "controlling executive act" within the meaning of *The Paquete Habana*. Perhaps, an act within the President's constitutional authority as sole organ or as commander-in-chief is controlling and will not be enjoined even if it violates a treaty or principle of law. I know of no other kind of acts that would relieve the Executive of the duty to take care that international law be faithfully executed.

III.

If I am correct, *Garcia-Mir* misinterpreted and misapplied *The Paquete Habana*. The court apparently considered any act of the President "controlling" and extended that to include an act by the Attorney General. It took the view that the President—and the Attorney General—had power "to disregard international law in service of domestic needs." There is no such principle. The President cannot disregard international law "in service of domestic needs" any more than he can disregard any other law.¹⁹ The court did not find that, as a result of some action within the President's constitutional power, the principle of international law against arbitrary detention had ceased to be a legal obligation of the United States. There was no suggestion that the President, acting under his constitutional power, had by executive agreement or executive order, made law that superseded the

¹⁸ That, I believe, is what the RESTATEMENT (REVISED) meant in §131 Comment *a*; and see §339. See also L. HENKIN, *supra* note 8, at 221–22.

¹⁹ The court's statement would have no basis even if international law were seen as a kind of federal common law; see note 13 *supra* and accompanying text. The President is bound to take care that the federal common law is faithfully executed. He can supersede a principle of the common law only by an exercise of his limited "legislative" authority, when he makes law by treaty, executive agreement or executive order within his constitutional powers or by authority delegated by Congress.

rule of international law forbidding arbitrary detention as domestic law.²⁰ There was no suggestion that the President ordered the detention in the exercise of his independent constitutional authority as sole organ or as commander-in-chief.

Only such presidential acts would constitute "controlling executive acts" permitting disregard of international law as the law of this land. In the absence of such controlling acts, the court should have required the Attorney General to take care that international law be faithfully executed.²¹

LOUIS HENKIN*

²⁰ There was no suggestion that the President had authority under the Constitution to detain the aliens in question. If the President had constitutional authority to order detention in the circumstances, an executive order of general applicability would presumably have the effect of law, and might claim to supersede other law, including international law. In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), the Supreme Court said that "the power of exclusion of aliens is also inherent in the executive department of the sovereign." That case has long been discredited; in any event, the executive power to exclude is not an executive power to detain arbitrarily. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court upheld detention of excludable aliens under authority granted by Congress, not on the President's own authority.

²¹ In the circumstances, that might not have required release, but it required the elaboration of standards and procedures to ensure that, as to each person, continued detention is not arbitrary in the circumstances.

* Of the Board of Editors.

NOTES AND COMMENTS

MARJORIE M. WHITEMAN (1898–1986)

Dr. Marjorie Millace Whiteman died at the age of 87, at her home in Liberty Center, Ohio, on July 6, 1986. A graduate of Ohio Wesleyan University and the recipient of LL.B. (1927) and J.S.D. (1928) degrees from Yale Law School (where she served as an editor of the *Yale Law Journal*), she was also a Carnegie fellow in international law. Later, Miss Whiteman served as a research associate with the Research Commission on Latin America at Columbia University, and then, in 1929, began her distinguished career with the Department of State, winning recognition throughout the world as an authority on international law.

Acting as special assistant (deputy) to the Legal Adviser of the Department, Green H. Hackworth, until his election to the International Court of Justice in 1946, Miss Whiteman became early on a specialist in international organization legal affairs, helping to draft the Charter of the United Nations in 1945 and the Universal Declaration of Human Rights in 1948. When Eleanor Roosevelt served as the United States representative on the United Nations Commission on Human Rights, Miss Whiteman was made her legal counsel.

Because of Miss Whiteman's knowledge of inter-American affairs and international organizations law, she played a major role in U.S. delegations to many Pan-American conferences. It was she who introduced the idea of consultation for the inter-American system. Originally presented by Miss Whiteman at the Inter-American Conference for Maintenance of Peace, held at Buenos Aires in 1936, the concept was later refined by American states into a useful legal mechanism. Her participation in the 1948 conference at Bogotá that wrote the Charter of the Organization of American States took place in an unusual set of circumstances. When a revolution broke out, Miss Whiteman was evacuated, only to be urgently recalled by Secretary of State George C. Marshall. In the disorder, the remainder of the U.S. delegation had been separated from the United States position papers for the conference. Miss Whiteman, who had prepared the papers, supplied the necessary information from memory.

In 1958, Miss Whiteman took part in the first United Nations Conference on the Law of the Sea. Some years later, she indicated to an associate that in preparing those position papers, she had "simply picked up where the 1930 Hague Conference on the Codification of International Law [which she had attended with Mr. Hackworth] had left off." To the end of her life, Miss Whiteman's memory was encyclopedic.

Following reorganization of the internal structure of the Department of State in 1949, Marjorie M. Whiteman was named as the first Assistant Legal Adviser for American Republic Affairs. Her extraordinary success in this capacity was attested to in 1958 when her clients, the Bureau of American

Republics Affairs, initiated her nomination for the National Civil Service League Award. In commending her value and effectiveness as a consultant, the Bureau emphasized in particular "her thorough knowledge of the law" and "her keen insight into political aspects of any given problem." She won this award as well as others. In June 1965, Miss Whiteman was designated as the first Counsellor for International Law within the Office of the Legal Adviser, a rank that she carried until her retirement on March 30, 1970.

Despite the demands of her regular workload, Marjorie M. Whiteman found time to write and edit the scholarly works in international law with which her name will remain identified. She had been a student of the great Edwin M. Borchard of Yale, whose treatise, *Diplomatic Protection of Citizens Abroad* (1915), she often called the first text on claims ever written. In the preface to her three-volume *Damages in International Law* (1937-1943), Miss Whiteman acknowledged that Borchard had prompted her study of the subject and made suggestions in the initial stages of the work (which she had, in fact, begun at Yale). Shortly after arriving at the Department of State, Miss Whiteman began her collaboration with Green H. Hackworth on the eight-volume Hackworth *Digest of International Law* (1940-1943), to which she was a major contributor. As nearly as can be determined, work began on Hackworth's *Digest* in 1932. Finally, in 1957, at the request of the then Legal Adviser, Herman Phleger, she embarked on what was to become the 15-volume Whiteman *Digest of International Law* (1963-1972).

On receiving the first volume of Whiteman's *Digest* in July 1963, Secretary of State Rusk stated:

This volume and the ones to come will fill an important gap in the legal materials available to the United States Government, to the Bar and to the public in this country, and to Governments and scholars throughout the world. We are grateful to you, Miss Whiteman, for undertaking the preparation of the *Digest of International Law*, and for the intensive work you have done and have directed over several years, to see the task through to completion

The American Society of International Law honored Miss Whiteman for the *Digest* by giving her its 1965 Annual Award. The Society praised the work as "invaluable" and observed that the "reader will note an emphasis less peculiarly American, and more truly international in approach and scope, than in the earlier *Digests* issued by our Government."

In 1966 the Department of State presented its Distinguished Honor Award to Miss Whiteman, citing her

[f]or signal achievement in the compilation and edition of her masterful "Digest of International Law" . . . [and] for many other outstanding achievements in nearly four decades of dedicated service, such as the drafting of the Charter of the Organization of American States and the Rio Pact; and for her vision, intellectual integrity, and achievement for world-wide recognition as an authority on international law.

In 1985 the American Society of International Law again honored its longtime Honorary Vice-President, and member of the Board of Editors of

the *American Journal of International Law*, Marjorie M. Whiteman, with the Manley O. Hudson Medal "for preeminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice."

MARIAN NASH LEICH*

PROFESSOR MARTIN A. FEINRIDER (1947–1986)

One of the Society's promising young teachers, Professor Martin A. Feinrider, died on June 16, 1986, the innocent victim of an automobile collision. Just a month before his death, he had been awarded tenure and a full professorship at Nova University.

The recipient of three degrees from the State University of New York at Buffalo (B.A., 1968; M.A., 1975; J.D., 1978) and an LL.M. degree from New York University (1982), Professor Feinrider blended a working background as a sociologist with a strong commitment to the development and use of public international law. His abiding focus on human rights became apparent in his student days when he received a diploma from the International Institute of Human Rights. His 8 years as a lawyer-scholar were full of accomplishment. After a year as Herzfeld Fellow of International Law at New York University, he received a diploma, cum laude, from the Hague Academy of International Law (1980), and began his law teaching career as Visiting Assistant Professor at the Willamette University College of Law (1980–1981). In 1981 he began teaching at Nova University.

Martin Feinrider was the author of numerous, always clearly written articles on human rights, arms control and foreign relations law. He regularly wrote guest editorials for the *Miami Herald*. He was an activist, deeply concerned and informed about the threat of nuclear arms. With Arthur S. Miller he coedited a useful collection of essays by leading scholars, entitled *Nuclear Weapons and Law* (1984). He served as a consultant and adviser to several professional organizations and publications, and participated as a panelist in regional and annual meetings of the Society.

News accounts of Professor Feinrider's tragic death emphasized his progressive views and warm classroom style. He had a rare capacity to articulate his own values forthrightly and precisely, to relate those values to specific principles and rules of international law, and to listen respectfully to the views of others. The loss we friends and colleagues feel will endure, as will his legacy.

JAMES A. R. NAFZIGER†

* Office of the Legal Adviser, Department of State. In addition to the author's personal knowledge and State Department records, factual material for this memorial was taken from 116 CONG. REC. 17,330 (1970).

† Professor of Law, Willamette University College of Law.

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

May 16, 1986

In the January 1961 issue of this *Journal*, there appeared, over my name, a Comment entitled *When Extradition Fails, Is Abduction the Solution?* The Comment dealt with the frustration of efforts to effect the extradition to Yugoslavia of Andrija Artukovic, a leader of the Croation "state" established in Yugoslavia under Nazi sponsorship during World War II. Artukovic had been charged with the killing of hundreds of thousands of victims guilty only of ethnic diversity. He had fled to the United States in 1948. The Comment remarked that, in view of the atrocities attributed to Artukovic, "[i]t would hardly be incredible if a group of Serbs, inspired by hatred, revenge and patriotism, should try to emulate the 'volunteers' who successfully contrived to move Adolph Eichmann from his refuge in Argentina to a prison in Israel." The Comment concluded that "it must be our position that the only acceptable way to deal with fugitive war criminals is through orderly processes of international law and extradition."

During the ensuing decades, efforts to deal with Artukovic through those processes continued sporadically. Finally, in February of 1986, the U.S. Court of Appeals for the Ninth Circuit affirmed an order of extradition to Yugoslavia, and Justice Rehnquist of the Supreme Court denied a stay. Within hours, Artukovic was on the way to Yugoslavia. Three months later, a court there sentenced him to death for the mass murders allegedly committed under his administration.

Clearly these results would be expected to be celebrated as a victory for the cause of human rights and the strength of the rule of law in international relations. As the writer of the Comment supporting those principles, and even hinting that an extralegal measure—abduction—might be warranted in the case of the hated Artukovic, I might be expected to lead the celebration. In fact, however, I am troubled by the news.

Artukovic is now 86 years old. He is reported to be in a state of senility and to suffer physical disabilities. The reports add that he was carried from the extraditing plane on a stretcher. He has been defended staunchly by his American-born children. All this gives me an uncomfortable feeling that subjecting him now to a trial, even for heinous crimes, may invoke a countering human right.

The United States does not have a practice, like Israel's, of prosecuting war criminals whose crimes were committed elsewhere. If we did, would our courts find Artukovic capable of defending himself? Could it be cruel and inhuman to subject a person in his condition to a trial for his life? Do children have a right to protection against loss of an aging, ailing, but cherished, parent whose atrophied mind retains no consciousness of his earlier life? In other words, can new developments call into play a different set of human rights, including the adage that justice must be tempered by mercy?

I am glad to be free of a duty to answer these questions. I feel better, however, to be raising them as the news media are describing the denouement of the scenario I first described 35 years ago.

MICHAEL H. CARDOZO

TO THE EDITOR IN CHIEF:

April 22, 1986

Professor W. Michael Reisman's editorial, *Has the International Court Exceeded its Jurisdiction?* (80 AJIL 128 (1986)), should not be allowed to stand without calling attention to an exaggeration that amounts to a complete misreading of text.

In arguing that the compromissory clause of the FCN Treaty between the United States and Nicaragua, which gives the Court jurisdiction over disputes as to "the interpretation or application" of the Treaty, does not present an independent ground for the Court's jurisdiction in *Nicaragua v. United States*, Professor Reisman says that the Court's majority, "for some reason not apparent on the face of the Judgment, ignored Article XXI(1)(d) of the Treaty." That article provides: "The present treaty shall not include the application of measures . . . (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." Then Professor Reisman makes his surprising conclusion: "In the face of such explicit language, it is difficult to see how any tribunal could use the Treaty to subject to its own jurisdiction matters that had been expressly excluded."

"*Expressly excluded*"? There is absolutely nothing in the language Professor Reisman quotes that justifies such a conclusion. Far from it. The language almost cries out for "interpretation or application" under the compromissory clause. For example:

- (1) What "obligations" is the United States "fulfilling" when it claims an "essential security interests" exception?
- (2) How much of what the United States did in and around Nicaragua was essential to its security?
- (3) How does the mining of Nicaraguan harbors contribute to the essential security interests of the United States?

A party to the Treaty clearly has the right to judicial interpretation of Article XXI(1)(d). Even if ultimately the United States prevails on what we might call the "Reisman interpretation" of this article, that possibility in no way diminishes the Court's *jurisdiction* so to determine.

Perhaps Professor Reisman has in mind the argument that has sometimes been made in this connection that, after all, an FCN treaty was never meant or intended to apply to military hostilities. Therefore, invoking it in the *Nicaragua* case is inapposite, and Article XXI(1)(d) underscores the point.

This is an argument that can be made concerning the interpretation of the FCN Treaty. Whether or not it is a good argument, it clearly goes to the scope of the Treaty and therefore is a matter for judicial determination under the "interpretation or application" part of the compromissory clause.

And it is not even a very good argument. Imagine for a moment that a nonlawyer is asked the question, "Would a treaty that establishes friendship, commerce and navigation between two countries be violated if one of the two countries surreptitiously lays mines in the harbor of the other country that result in the destruction of a number of commercial vessels?" Only a lawyer, or maybe only a lawyer from New Haven, could be imagined to answer this question: "No, because the parties obviously did not intend the treaty to cover major breaches of friendship, commerce or navigation; their

expectation was only that minor irritations would come within its prohibitions."

With all my respect for my coeditor, Professor Reisman, I think this time he has failed to respect the ordinary meaning of language.

ANTHONY D'AMATO

W. Michael Reisman replies:

The interpretation of international agreements, always a challenging and often a controversial task, has been measurably facilitated by the Vienna Convention on the Law of Treaties. Article 31(1) of the Convention instructs: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The "ordinary meaning" of the terms of Article XXI(1)(d) of the United States-Nicaragua FCN Treaty is quite plain. As for its object and purpose, the provision could serve no purpose if it did not protect the United States from third-party decision in matters relating to its national security.

With due respect, the issue is not whether one is a lawyer from New Haven, but whether one can read.

TO THE EDITOR IN CHIEF:

May 9, 1986

Sandra Maviglia¹ states that Mexico's recent decision² to permit up to 100 percent foreign ownership in certain industries, including high-technology industries, represents a "rational plan" and an attitude toward foreign investment that has "reached an equilibrium."³ There are those of us who would disagree.

There is little dispute that Mexico sorely needs transfers of foreign capital and technology. But implementing foreign investment incentives through a series of far-reaching exceptions to Mexico's 1973 Foreign Investment Law (FIL) will probably be ineffective and may even be dangerous to Mexico's stability. Ms. Maviglia correctly points out that it was probably more feasible for the Mexican Government to make its new allowances to foreign investors through an existing, flexible framework than to enact new legislation. But she does not question Mexico's use of the FIL.

The FIL simply was not designed to allow foreign investment. When it was enacted, the FIL culminated over 60 years of consistent attempts by Mexico to reduce and restrict foreign control over its economy and resources. Mexico is now relying on the FIL to facilitate a policy which is antithetical to the FIL's original purpose.

A much better vehicle for attracting needed foreign investment would be Mexico's Foreign Trade Zones (FTZs). Used worldwide by developed

¹ Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AJIL 281 (1986).

² NATIONAL FOREIGN INVESTMENT COMMISSION OF MEXICO, GUIDELINES FOR FOREIGN INVESTMENT AND OBJECTIVES FOR ITS PROMOTION (1984); see also *Heavy Industry, Computer Firms Named: Mexico Invites Foreign Investors*, Wash. Post, Feb. 27, 1984, §C, at 3, col. 1.

³ Maviglia, *supra* note 1, at 304.

and developing countries, FTZs are neutral, stockaded areas that offer trade-related services and exemptions from national and local laws for the purposes of attracting direct foreign investment, encouraging exports or promoting trade in general.⁴ In Mexican FTZs, one of the most attractive incentives granted to investors is *the allowance of 100 percent foreign ownership*.⁵ However, present FTZ regulations do not permit the kinds of capital and technology that Mexico needs.

Mexico's most successful use of FTZs to introduce new majority-owned foreign investment has been the *Programa de Industrialización Fronteriza* (PIF),⁶ known in the United States as the Border Industrialization Program (BIP).⁷ Limited to investments in labor-intensive assembly operations, the BIP began in 1965 as a species of FTZ and then evolved into a separate investment program for the purpose of alleviating high unemployment.

Originally, the BIP was restricted to a 20-kilometer strip along Mexico's international borders and the coastlines. In 1972, after proving to be effective in alleviating Mexico's unemployment problems,⁸ the BIP was extended to the entirety of Mexico. Today companies interested in operating an assembly plant must seek approval from the Ministry of Industry and Commerce and the Ministry of Finance.

The following are some possible advantages of using FTZs instead of an exceptions clause in the FIL to attract direct foreign investment in capital-intensive, high-technology industries.

1. FTZs are more flexible than the FIL. Because each FTZ is independent of all others in the country, Mexico could try allowing majority-owned foreign investments in a broader spectrum of industries. Similarly, Mexico can offer incentives that differ from FTZ to FTZ or that are not offered nationwide. Under the FIL exceptions, there is no infrastructure for making discrete, discriminatory concessions.

2. FTZs better complement Mexico's development policies. For example, Mexico continues to promote import substitution,⁹ so controlling the movement of goods is especially important. FTZs are generally heavily guarded, making it difficult for goods to enter Mexico's consumer markets.

3. An institutional solution would be better than an ad hoc one. First, the more confidence a foreign investor has in the sincerity and ability of the

⁴ For a survey of FTZs throughout the world, see, e.g., W. DIAMOND & D. DIAMOND, *NEW TAX-FREE TRADE ZONES OF THE WORLD* (1977). On FTZs in the United States, see Herrick, *Foreign Trade Zones—Free Trade Benefits*, FLA. B.J. 416 (1982).

⁵ When the Foreign Investment Law was enacted in 1973, the BIP and FTZs were exempted from its provisions.

⁶ First announced in 1965, the program was finally codified in regulations of Mar. 17, 1972. Regulation of Paragraph Third of Article 321 of the Customs Code of Mexico of Mar. 17, 1971, D.O., Oct. 31, 1972.

⁷ There are several American articles that have followed the BIP. See, e.g., Treviño, *Border Industrialization Program: Legal Guidelines for the Foreign Investor*, 4 J. INT'L L. & POL'Y 89 (1974); Treviño, *Mexico: The Present Status of Legislation and Governmental Policies on Direct Foreign Investments*, 18 INT'L LAW. 297 (1984).

⁸ See Christman, *Border Industries Foster New Jobs, More Experts*, MEX.-AM. REV., Feb. 1968, at 9; *Big Deal at the Border*, NEWSWEEK, Jan. 24, 1972, at 59.

⁹ A policy whereby emphasis is placed upon production of goods that replace ones being imported for domestic consumption.

Government to carry out its promises, the fewer concessions the investor will exact in the bargaining process. Foreign investors all over the world are familiar with FTZs, and time has shown that, in Mexico, they are part of a stable system to which the Government has remained committed from administration to administration. Second, as the most stable of the Latin American countries, Mexico is a leader, an example for other developing countries. While it is possible that Mexico could weather the ad hoc course it has set in its February 1984 Guidelines, most likely other developing countries could not.

Mexico must have a mechanism not only for *allowing* majority-owned foreign investments in new industries, but also for *regulating* such investments. Mexican history has shown that failure to regulate foreign investors can lead to revolution. Mexican history has also shown that FTZs can successfully regulate the introduction of majority-owned foreign investments.

SAMUEL W. BETTWY*

Sandra Maviglia replies:

*Maquiladoras*¹ or, as Mr. Bettwy calls them, "foreign trade zones" were created by the federal Government of Mexico not as a vehicle to promote foreign investment, but as a means to alleviate unemployment in the United States-Mexico border area resulting from cancellation of the *bracero* program. This was made clear in footnote 57 of my article² and is recognized by Mr. Bettwy himself in the text of his letter.

For all its attractiveness, however, the *maquiladora* program, which subsequently was expanded to areas throughout the country, is essentially ineffective for investors desiring to tap the wealth of the Mexican domestic market—one of the most alluring in Latin America. Unless a special exception is granted by the Secretary of Commerce and Industrial Development,³ a difficult exercise rarely resulting in a favorable response, 100 percent of all products assembled or processed in *maquiladoras* must be exported out of Mexico.⁴ What Mr. Bettwy fails to comprehend is that there are two separate programs,⁵ each serving a completely different purpose and consumer market.

Mr. Bettwy states that the foreign investment incentives resulting from the Guidelines "will probably be ineffective and may even be dangerous to Mexico's stability," presumably because the Guidelines represent to him an "ad hoc" solution rather than an "institutional" approach. Nevertheless, point 1 of his letter suggests the application of discriminatory concessions on the various foreign trade zones operating nationwide. How is this to

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An elaboration of this response can be found in Bettwy, *Mexico's Development: Foreign Trade Zones and Direct Foreign Investment*, 22 COMP. JURID. REV. 49 (1985).

¹ D.O., Aug. 15, 1983. See also Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AJIL 281, 285 n.57 (1986).

² Maviglia, *supra* note 1, at 285 n.57.

³ D.O., Aug. 15, 1983.

⁴ *Id.*

⁵ Actually, there are a great many others, but my article addressed one and Mr. Bettwy's response another.

differ from the current discretionary mechanisms available for exceptions to the 51-49 percent rule under both the FIL and the Guidelines? Moreover, Mr. Bettwy states that the FIL lacks the "infrastructure for making discrete, discriminatory concessions," but he inexplicably fails to explain why the reader must assume that such infrastructure exists under the *maquiladora* program.

With respect to point 2 of Mr. Bettwy's letter, he should be aware, I am sure, that Mexico will find it very difficult to continue to support import substitution while making a firm commitment to become a full member of GATT by the fall of 1986. Moreover, how can the *maquiladora* program contribute to the promotion of import substitution if the most important quid pro quo for 100 percent exportation of products is the free importation of equipment, components and materials?

My article addressed Mexico's Guidelines for Foreign Investment, as the title itself suggests, because they are the most important development in Mexico's regulation of foreign investment in more than 10 years. My intention never was that of covering the entire gamut of laws and regulations affecting foreign investors in Mexico. Witness the fact that the article did not address the regulations for the establishment of offshore branches of foreign banks in Mexico, an extremely important piece of legislation, at a time when foreign banking and the external debt are top priorities in the Mexican and world press. A comprehensive treatment of all laws and regulations affecting foreign investors in Mexico obviously is more appropriate for a treatise than a legal periodical.

Contrary to Mr. Bettwy's response, the Foreign Investment Law (FIL) was designed to allow foreign investment, and I fail to understand how any foreign investment legal practitioner could arrive at any other conclusion. For the reasons outlined in the article, however, Mexico's regulations and policies must address its own unique circumstances and cannot be dependent upon the "example" needed by other countries.

Also contrary to Mr. Bettwy's response, the article does question Mexico's use of the FIL, but primarily because, as the Foreign Investment Commission (FIC) acknowledged, "a systematic policy has not always been followed for an effective utilization of its potential for the country's development."⁶ Furthermore, the Guidelines now provide the investment community with an indicator of which specific activities are being actively promoted and are likely to receive FIC authorization for 100 percent foreign equity pursuant to the FIL. The Guidelines signify a changing attitude and represent Mexico's determination to actively promote industries deemed beneficial to the Mexican economy. Accordingly, it is believed by many persons that the Guidelines will greatly assist those investors interested in taking advantage of the Mexican consumer market.

I find it very difficult to rebut Mr. Bettwy's political rhetoric. Although he makes extremely delicate allegations suggesting that the Guidelines "may even be dangerous to Mexico's stability" and that the lack of regulatory mechanisms under the FIL "can lead to revolution," he fails to substantiate these assertions.

⁶ NATIONAL FOREIGN INVESTMENT COMMISSION OF MEXICO, FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK AND ITS APPLICATION 24 (1984) (emphasis added); see also Maviglia, *supra* note 1, at 295 and *passim*.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

PROTECTION OF MARINE ENVIRONMENT

(U.S. *Digest*, Ch. 7, §9)

Oil Pollution Damage

On November 5, 1985, President Ronald Reagan transmitted to the Senate, for advice and consent to ratification, the Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage of 1969 (Civil Liability Convention) and the Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 (Fund Convention), both adopted on May 25, 1984, at the conclusion of the International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, held at London from April 30 to May 25, 1984.¹

The 1984 Protocols revised and updated the international system of liability and compensation for damage caused by vessel-source oil pollution, increasing maximum liability and compensation limits to amounts approximately four times higher than those currently in effect as among parties to the Conventions, as amended. President Reagan pointed out that these limits are now deemed sufficient to compensate all legitimate claimants with regard to any oil spill likely to occur in waters off United States coasts. They would, the President continued, provide substantially greater levels of compensation for U.S. citizens sustaining oil pollution damage than what is currently available under existing domestic statutes or voluntary industry mechanisms.

The President's letter was accompanied by a report on the 1984 Protocols to the Civil Liability and Fund Conventions, submitted by Secretary of State George P. Shultz under date of October 7, 1985.²

* Office of the Legal Adviser, Department of State.

¹ The Senate Committee on Foreign Relations held hearings on the 1984 Protocols on May 15, 1986. In the meantime, on May 14, 1985, the House of Representatives passed legislation to create a comprehensive domestic system of liability and compensation for oil pollution (title IV of H.R. 2005, 99th Cong., 1st Sess. (1985)). If enacted into law, this legislation would also implement the 1984 Protocols at such time as they are in force for the United States.

² For the texts of the Protocols and Secretary Shultz's report, see S. TREATY DOC. 12, 99th Cong., 1st Sess. (1985).

INTERNATIONAL ECONOMIC LAW

(U.S. *Digest*, Ch. 10, §4)*Bilateral Investment Treaties*

On March 12, 1986, President Ronald Reagan forwarded to the Senate for advice and consent to ratification six bilateral investment treaties concluded under the bilateral investment treaty program initiated in 1981 to encourage and protect United States investment in developing countries. The treaties form part of an effort by the United States to encourage its respective treaty partners and other governments to adopt macroeconomic and structural policies promoting economic growth. They reinforce the following four principles: (1) fair, equitable and nondiscriminatory treatment; (2) international law standards for expropriation and compensation; (3) free financial transfers; and (4) settlement of investment disputes, including through international arbitration.

The six treaties are: (1) the Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, with Agreed Minutes;¹ (2) the Treaty Between the United States of America and the Republic of Senegal Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol;² (3) the Treaty Between the United States of America and the Republic of Haiti Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol;³ (4) the Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol;⁴ (5) the Treaty Between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments, with Protocol;⁵ and (6) the Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, with Protocols.⁶

The treaties were accompanied by reports from Secretary of State George P. Shultz to the President, dated February 19, 1986 (Haiti and Turkey), February 20, 1986 (Morocco, Panama, and Senegal), and February 26, 1986 (Zaire).⁷

ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §12)*Libya*

By identical letters, dated June 30, 1986, to Senator Richard G. Lugar, Chairman of the Senate Committee on Foreign Relations, and to Congress-

¹ Oct. 27, 1982, S. TREATY DOC. 14, 99th Cong., 2d Sess. (1986).

² Dec. 6, 1983, S. TREATY DOC. 15, 99th Cong., 2d Sess. (1986).

³ Dec. 13, 1983, S. TREATY DOC. 16, 99th Cong., 2d Sess. (1986).

⁴ Aug. 3, 1984, S. TREATY DOC. 17, 99th Cong., 2d Sess. (1986).

⁵ July 22, 1985, S. TREATY DOC. 18, 99th Cong., 2d Sess. (1986).

⁶ Dec. 3, 1985, S. TREATY DOC. 19, 99th Cong., 2d Sess. (1986).

⁷ For the reports, see the respective Treaty Documents, notes 1-6 *supra*.

man Dante B. Fascell, Chairman of the House Committee on Foreign Affairs, Secretary of State George P. Shultz confirmed that all United States companies were required to terminate their operations in Libya as of that date. Secretary Shultz also provided the following update of recent actions taken by the administration with respect to economic sanctions against Libya:

As you know, we have been concerned for a number of years about Libyan state-sponsored terrorism. Since 1981, the United States has taken important steps in response to Libya's hostile policies and actions. We denied licenses for exports that may contribute to Libya's military potential or enhance its ability to support acts of international terrorism. We denied exports of most national security controlled items; of goods or technical data which would contribute directly to the Ras Lanuf petrochemical complex; of aircraft, parts and large off-road tractors with a high risk of diversion by Libya for military activities; and of oil and gas technology and equipment not available from third-country sources. On the import side, we banned Libyan crude oil and petroleum products refined in Libya, stopped Libyans from coming to the United States for aviation maintenance, flight operations, or nuclear-related studies. And we also repeatedly called upon U.S. companies to withdraw American citizens from Libya, for their safety, and we restricted the use of U.S. passports for travel there.

In the aftermath of the December 27, 1985, Libyan-supported terrorist attacks at the Rome and Vienna airports, it became clear that tougher and more comprehensive measures were required. The United States adopted a series of additional economic sanctions aimed at demonstrating our opposition to Qadhafi's support of terrorism and making clear to Qadhafi that he must pay a price for his policies. We also commenced discussions with friends and allies in an effort to obtain their support for our objectives.

The key prohibitions of President Reagan's Executive Orders of January 7 and January 8, 1986, were as follows:

- No grants or extension of credits or loans to the Government of Libya or its controlled entities.
- No exports to Libya from the U.S.; no imports into the United States of goods or services of Libyan origin.
- No transactions involving transportation to or from Libya.
- No purchase of goods for export from Libya to any third country.
- No performance of contracts in support of projects in Libya.
- A freeze on all Libyan Government property or interests in property in the U.S. or in the possession of U.S. persons, including overseas branches of U.S. banks. [Libya has sued Bankers Trust Company in London seeking release of certain of these blocked assets, and we are working with Bankers Trust in the preparation of its defense.]

One of the major objectives of the sanctions was to eliminate U.S. contributions to the Libyan economy, thereby helping to diminish the Qadhafi regime's financial resources. In carrying out this objective, the Administration sought to ensure that no financial windfall would accrue to Qadhafi's benefit. Accordingly, the United States Government granted certain licenses, including those to several U.S. oil companies with operations in Libya, to provide additional time for such firms to

terminate their operations and to negotiate with Libya for a disposition of those assets.

Following the bombing of the Berlin discotheque and our military response, we discussed with our allies at the Tokyo Economic Summit the need for further measures regarding Libya. We are extremely pleased by the Tokyo Summit communique. Accordingly, the Administration has adopted the following additional actions:

—All U.S. companies must terminate operations in Libya effective today, June 30, 1986. U.S. companies, henceforth, will be permitted only to continue efforts to protect or dispose of their assets in Libya. No payments to Libya may be made unless authorized in advance by the U.S. Government.

—Restrictions on exports of U.S. components and parts have been tightened. Exports of goods to third countries are prohibited where the exported goods are intended specifically for substantial transformation or incorporation abroad into manufactured products to be used in the Libyan petroleum and petrochemical industry.

—In consultation with our European allies, we are pursuing a ban on imports into the U.S. of petroleum products refined in third countries from Libyan crude oil. We will seek at least a certification that third-country refined products exported to the U.S. comply with this restriction.

The United States Government is determined to demonstrate that it will not entertain even the appearance of continuing to do business as usual with Qadhafi. We have been pleased by the cooperation demonstrated by the U.S. companies, especially in light of the economic dislocation they have borne, and we expect this cooperation to continue.

To achieve our policy objectives vis-a-vis Libya it is crucial that we obtain the close cooperation of our allies. We have been pleased by their pledges not to undercut U.S. measures, as well as their willingness to adopt certain measures of their own. We are now continuing our discussions to obtain their support for additional measures designed to achieve our common objectives.¹

The Statement on International Terrorism, adopted on May 5, 1986 at the Tokyo Economic Summit, follows:

1. We, the Heads of State or Government of seven major democracies and the representatives of the European Community, assembled here in Tokyo, strongly reaffirm our condemnation of international terrorism in all its forms, of its accomplices and of those, including governments, who sponsor or support it. We abhor the increase in the level of such terrorism since our last meeting, and in particular its blatant and cynical use as an instrument of government policy. Terrorism has no justification. It spreads only by the use of contemptible means, ignoring the values of human life, freedom and dignity. It must be fought relentlessly and without compromise.

2. Recognizing that the continuing fight against terrorism is a task which the international community as a whole has to undertake, we pledge ourselves to make maximum efforts to fight against that scourge.

¹ Dept. of State File No. P86 0080-1727.

Terrorism must be fought effectively through determined, tenacious, discreet and patient action combining national measures with international cooperation. Therefore, we urge all like-minded nations to collaborate with us, particularly in such international fora as the United Nations, the International Civil Aviation Organization and the International Maritime Organization, drawing on their expertise to improve and extend countermeasures against terrorism and those who sponsor or support it.

3. We, the Heads of State or Government, agree to intensify the exchange of information in relevant fora on threats and potential threats emanating from terrorist activities and those who sponsor or support them, and on ways to prevent them.

4. We specify the following as measures open to any government concerned to deny to international terrorists the opportunity and the means to carry out their aims, and to identify and deter those who perpetrate such terrorism. We have decided to apply these measures within the framework of international law and in our own jurisdictions in respect of any state which is clearly involved in sponsoring or supporting international terrorism, and in particular of Libya, until such time as the state concerned abandons its complicity in, or support for, such terrorism. These measures are:

- refusal to export arms to states which sponsor or support terrorism;
- strict limits on the size of the diplomatic and consular missions and other official bodies abroad of states which engage in such activities, control of travel of members of such missions and bodies, and, where appropriate, radical reductions in, or even the closure of, such missions and bodies;
- denial of entry to all persons, including diplomatic personnel, who have been expelled or excluded from one of our states on suspicion of involvement in international terrorism or who have been convicted of such a terrorist offence;
- improved extradition procedures within due process of domestic law for bringing to trial those who have perpetrated such acts of terrorism;
- stricter immigration and visa requirements and procedures in respect of nationals of states which sponsor or support terrorism;
- the closest possible bilateral and multilateral cooperation between police and security organizations and other relevant authorities in the fight against terrorism.

Each of us is committed to work in the appropriate international bodies to which we belong to ensure that similar measures are accepted and acted upon by as many other governments as possible.

5. We will maintain close cooperation in furthering the objectives of this statement and in considering further measures. We agree to make the 1978 Bonn Declaration more effective in dealing with all forms of terrorism affecting civil aviation. We are ready to promote bilaterally and multilaterally further actions to be taken in international organizations or fora competent to fight against international terrorism in any of its forms.²

² 22 WEEKLY COMP. PRES. DOC. 583 (May 12, 1986); DEPT. ST. BULL., No. 2112, July 1986, at 5.

(U.S. *Digest*, Ch. 10, §12)

International Terrorism

In a letter to Secretary of State George P. Shultz dated April 2, 1986, Senator Richard G. Lugar, Chairman of the Senate Committee on Foreign Relations, requested that the Department prepare for the use of the Senate an analysis of the use of economic sanctions and boycotts as a principal diplomatic tool to combat international terrorism. On June 17, 1986, James W. Dyer, Acting Assistant Secretary of State for Legislative and Intergovernmental Affairs, forwarded the study, "The Advisability of Economic Sanctions Against Countries that Support or Harbor International Terrorists," with a letter reading in part:

As indicated in this study, the Administration is prepared to use economic sanctions when appropriate as part of our effort to deter countries from supporting terrorism. This policy is exemplified by our actions against Libya. In addition to their potential economic effect on the target country, sanctions can send a powerful non-military signal that the United States will take measures to exact costs from states that support terrorism. We recognize, however, that the effectiveness of economic sanctions can be limited by a number of factors, including the availability of similar products from other suppliers and the existence of alternative markets for the target country's exports. Recognizing this, we both seek and welcome multilateral support for and cooperation with our sanctions.

Existing legislation gives the President extensive authority to take economic measures against countries that support terrorism. Where appropriate, as in the case of Libya, we have used this authority vigorously. State support for terrorism is a dynamic situation and before acting we must be able to take specific circumstances into account, including the likely diplomatic and economic consequences of our actions. Other factors which must be considered include the range of relations we have with a specific country and the direction in which that country's policies might be moving. Legislation which would tie our hands by mandating blanket prohibitions on trade could potentially harm U.S. business and our relations with our allies without imposing any significant costs on the target country.¹

The study addressed specific points suggested by Senator Lugar: (1) the advisability of imposing trade sanctions against countries that support or harbor international terrorists; (2) economic consequences of trade sanctions; (3) diplomatic consequences of trade sanctions; (4) the potential for gaining international or multilateral cooperation in imposing sanctions; and (5) the adequacy of existing authority to impose economic sanctions. The study contained, in Appendix A, statutory authorities for sanctions, and in Appendix B, sanctions required by United States law, as follows:

¹ Dept. of State File No. P86 0081-0112.

1. *Commercial exports.* Section 6(j) of the Export Administration Act (50 U.S.C. App. 2405(j)) requires that certain Congressional committees be notified at least 30 days before any license is approved for exports valued at more than \$7 million concerning which the Secretary of State has made the following determinations:

(A) Such country has repeatedly provided support for acts of international terrorism.

(B) Such exports would make a significant contribution to the military potential of such country, including its military logistics capability, or would enhance the ability of such country to support acts of international terrorism.

(There is technically no requirement that licenses for such exports actually be denied if the required advance notice is not given.) As amended this year, this section requires that once a determination is made with respect to a particular country, it may not be rescinded unless the President certifies and reports to Congress that:

(A) the country concerned has not provided support for international terrorism, including support or sanctuary for any major terrorist or terrorist group in its territory, during the preceding 6-month period; and

(B) the country concerned has provided assurances that it will not support acts of international terrorism in the future.

2. *Foreign assistance.* Section 620A of the Foreign Assistance Act (FAA) (22 U.S.C. 2371) prohibits assistance under the FAA, the Agricultural Trade Development and Assistance Act, the Peace Corps Act, the Export-Import Bank Act of 1945, or the Arms Export Control Act, to any country which the President determines:

(1) grants sanctuary from prosecution to any individual or group which has committed an act of international terrorism, or

(2) otherwise supports international terrorism.

The President may waive this prohibition if he determines (and notifies Congress) "that national security or humanitarian reasons justify such waiver." If sanctions are imposed, the section states that the President should call on other countries to take similar action. Moreover, section 512 of the Foreign Assistance and Related Appropriations Act, 1986, prohibits use of any appropriated funds for assistance to, *inter alia*, Libya, Syria, P.D.R. Yemen, and Cuba.

3. *FMS sales.* Section 3(f) of the Arms Export Control Act (22 U.S.C. 2753(f)) requires the President to terminate all sales under the Act to any government "which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism." Once this provision is invoked, sales may not be made for a one-year period (to be extended for an additional year for any subsequent granting of sanctuary). The President may refrain from invoking the provision if he finds (and reports to Congress) "that the national security requires otherwise"

4. *Trade preferences.* Section 502(b)(7) of the Trade Act of 1974 (19 U.S.C. 2462(b)(7)) requires that the President not designate a country as a "beneficiary developing country" for purposes of the Generalized System of Preferences, if such country "aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of

international terrorism” The President may nonetheless make such a designation if he determines (and reports to Congress) “that such designation will be in the national economic interest of the United States”

5. *Aviation sanctions.* Section 1115 of the Federal Aviation Act (49 U.S.C. 1515), as amended by the International Security and Development Cooperation Act of 1985, requires the Secretary of Transportation to assess security conditions at international airports abroad. If deficiencies are found at a foreign airport and not corrected within 90 days, the U.S. public would be notified through public postings at airports, a notice in the *Federal Register*, ticket supplements, and a travel advisory.

Section 552 of the International Security and Development Cooperation Act of 1985 (49 U.S.C. 1515a) provides for the President to suspend foreign assistance to a country which has an airport against which sanctions have been imposed “if the Secretary of State determines that such country is a high terrorist threat country.” Suspension may be waived if national security interests or a humanitarian emergency require.²

² *Id.*, No. P86 0081-0114.

JUDICIAL DECISIONS

MONROE LEIGH

Antitrust—high standard of proof required to show existence of conspiracy

MATSUSHITA ELECTRIC INDUSTRIAL CO. v. ZENITH RADIO CORP. 106 S.Ct. 1348.

U.S. Supreme Court, March 26, 1986.

Petitioners, Japanese television manufacturers, sought review of a denial of their motion for summary judgment in a case filed by respondents, American television manufacturers, alleging that petitioners had engaged in an illegal predatory pricing conspiracy. In a five to four decision, the U.S. Supreme Court (per Powell, J.) reversed and remanded, *holding* that: (1) an alleged conspiracy to impose price and market allocation restraints that do not have an injurious competitive effect in U.S. commerce is not actionable under U.S. antitrust laws; and (2) where the factual context suggests the absence of a motive to engage in a predatory pricing conspiracy, plaintiffs have a more rigorous burden of proof than would otherwise be necessary to establish a material issue as to the existence of an illegal conspiracy. Justice White, joined by Justices Brennan, Blackmun and Stevens, dissented.

Respondents, Zenith Radio Corporation and National Union Electric Corporation, filed suit in the U.S. District Court for the Eastern District of Pennsylvania claiming that Japanese manufacturers of consumer electronic products ("CEPs") (primarily, television sets) had conspired "to raise, fix and maintain artificially *high* prices . . . in Japan and . . . to fix and maintain *low* prices for television receivers exported to and sold in the United States," producing substantial losses to respondents in violation of sections 1 and 2 of the Sherman Act, section 2(a) of the Robinson-Patman Act, section 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.¹ Respondents further claimed that petitioners operated at full capacity and charged high domestic prices to obtain a reasonable rate of return. This, in turn, created excess supply that was available to be sold below cost in the United States. The conspiracy allegedly began as early as 1953 and was in full operation by the late 1960s. After extensive discovery, the district court granted petitioners' motion for summary judgment, finding that any inference of conspiracy was unreasonable.²

¹ 106 S.Ct. 1348, 1351-52 (emphasis in original).

² The claims based on the Sherman Act, the Wilson Tariff Act and the Robinson-Patman Act depended on the same alleged conspiracy, and therefore the district court dismissed them on the same grounds. *Id.* at 1352. The district court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916, and the court of appeals subsequently reversed. Petitioners did not present these claims in the petition for certiorari, however, and the Supreme Court did not address the issue. *Id.* at 1352 n.3.

The U.S. Court of Appeals for the Third Circuit reversed in part and affirmed in part, determining that a fact-finder could conclude from the evidence³ that petitioners had met regularly to raise prices in the Japanese market, had fixed minimum prices for CEPs exported to the U.S. market by a formal agreement with Japan's Ministry of International Trade and Industry (referred to as the "check price agreements"), and had agreed to limit product distribution to five American distributors (referred to as the "five-company rule"). The court of appeals concluded that a fact-finder could infer the existence of a conspiracy to depress prices in the U.S. market in order to drive out American competitors, this conspiracy being funded by excess profits obtained in the Japanese market. Petitioners filed a petition for certiorari, and the Supreme Court agreed to review the antitrust conspiracy issues in the context of a summary judgment motion.⁴

In examining the appellate decision, the Supreme Court first found that petitioners' alleged pricing scheme in Japan, the five-company rule, and the check price agreements were not "direct evidence" of a conspiracy intended to injure respondents. Noting that "American antitrust laws do not regulate the competitive conditions of other nations' economies," the Court found that neither the alleged cartelization of the Japanese market nor the market restraints in the United States could have injured respondents and therefore did not give respondents a cognizable claim against petitioners for antitrust damages.⁵

The second and more critical issue before the Supreme Court was whether respondents had produced sufficient evidence to survive summary judgment on their alternative theory that these alleged conspiracies were circumstantial evidence of a conspiracy to monopolize the American market by predatory pricing. The Supreme Court found that to survive petitioners' motion for summary judgment, respondents had to surmount three hurdles. First, respondents had to "establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury."⁶ Second, because the factual context rendered respondents' predatory pricing claim economically implausible, respondents had to offer more persuasive evidence than would otherwise

³ The appellate court reversed a decision by the federal district court excluding evidence proffered by respondents to demonstrate the existence of the conspiracy. The Supreme Court did not review the admissibility issue.

⁴ Both the court of appeals and the Supreme Court determined that it was unnecessary to address petitioners' claims that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign because the facts of the case did not present a sovereign compulsion issue. 106 S.Ct. at 1353, 1362.

⁵ *Id.* at 1354.

⁶ *Id.* at 1355-56. Rule 56(e) of the Federal Rules of Civil Procedure governs the standard of proof for a summary judgment motion and provides, in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him.

be necessary. Third, respondents had to present evidence that tended to exclude the possibility that the alleged conspirators had acted independently.

Applying this analysis to the facts of the case, the Supreme Court found that the court of appeals had not applied appropriate standards in evaluating the district court's decision granting summary judgment. The Court found that the economic obstacles to the ultimate success of the alleged predatory pricing conspiracy—the unlikelihood of long-term success of predatory pricing schemes and the slight prospects of attaining monopoly power—suggested that petitioners had had no plausible motive to enter into the alleged conspiracy. The Court concluded that the court of appeals had erroneously inferred a possible concert of action by failing to consider the absence of a plausible motive to engage in predatory pricing. According to the Supreme Court, "The court [of appeals] apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial."⁷ Instead, the court had improperly focused on evidence of "collateral conspiracies" which had little relevance to the alleged predatory pricing conspiracy. The Court stated that "in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a 'genuine issue for trial.'"⁸

Regarding the risks involved in a predatory pricing conspiracy, the Court noted that monopoly power, once attained, must be maintained long enough to offset losses caused by earlier below-cost pricing—a goal easily defeated if other U.S. or foreign manufacturers enter the market after prices are raised to share in the excess profits. Moreover, the Court observed that where, as here, a large number of firms has allegedly conspired, two problems occur: allocating the burdens and benefits of the conspiracy among the firms becomes difficult to accomplish; and there is an increased risk that one of the firms will covertly violate the scheme, thereby undermining its success.

The Court also observed that the conspiracy theory was very unlikely in this factual context because the lower courts had found no evidence of any success, despite respondents' allegations that the conspiracy had been in effect since the 1950s or 1960s.⁹ In addition, sustained losses over 20 years could require a correspondingly long time to recoup, and thus would magnify the risk factors inherent in all predatory pricing schemes. The Court concluded that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist."¹⁰

In his dissenting opinion, Justice White faulted the Court for committing three errors. First, Justice White felt that the Court's opinion "suggests that a judge hearing a defendant's motion for summary judgment in an antitrust

⁷ 106 S.Ct. at 1353.

⁸ *Id.* at 1362.

⁹ The Court observed that "RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets." *Id.* at 1359.

¹⁰ *Id.*

case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff."¹¹ Justice White concluded that the decision either overturned settled law or used "unnecessarily broad and confusing language" regarding the appropriate summary judgment standard.¹²

Second, Justice White noted that the Court invaded the province of the jury by making assumptions based on the Court's own economic analysis of predatory pricing schemes. Justice White claimed that the Court ignored contrary conclusions that may be inferred from the evidence regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among the petitioners in the United States.

Finally, the dissenting opinion disagreed with the majority's position that the court of appeals had committed error. Justice White maintained that the court of appeals had made a careful analysis of evidence of the five-company rule, cartelization in Japan, collusive dumped prices in the United States and long-term, below-cost sales, and concluded that a fact-finder could reasonably infer that an actionable conspiracy existed. Therefore, Justice White determined that the court of appeals had correctly held that respondents had demonstrated the existence of genuine issues of material fact.

The Supreme Court's decision probably reflects increasing judicial concern with the burdens that protracted antitrust litigation imposes on courts and defendants in cases of questionable merit. The majority is also uneasy over the chilling effect jury review would have on what the Court viewed as procompetitive conduct, i.e., competitive pricing that benefited consumers—"the very conduct the antitrust laws are designed to protect."¹³ Undoubtedly, the Court felt this case should not go forward because of the absence of any evidence of injury to the domestic producers or success of the conspiracy during the 20 years of its alleged existence. On the other hand, there is great force in Justice White's dissent.

Enforcement of foreign judgments—date for converting foreign currency awards to dollars—breach-day conversion rule

COMPETEX, S.A. v. LABOW. 783 F.2d 333.

U.S. Court of Appeals, 2d Cir., February 12, 1986.

Plaintiff, Competex, S.A., brought a diversity action in the U.S. District Court for the Southern District of New York to enforce a judgment by an English court for £187,930 awarded in a breach-of-contract action against defendant LaBow. The district court found that the English judgment was entitled to recognition and enforcement and applied the New York "breach-day" conversion rule, converting defendant's judgment debt into dollars at a rate of \$2.20 per pound sterling, the rate prevailing on the day of the English judgment. After the value of the pound fell to \$1.50, defendant

¹¹ *Id.* at 1363.

¹² *Id.* at 1364.

¹³ *Id.* at 1360.

moved under Federal Rule of Civil Procedure 60(b) for a declaratory ruling that he could satisfy the American judgment by paying the underlying English judgment in pounds; and while the motion was pending, defendant paid the English judgment in pounds. The district court subsequently denied the motion, credited defendant's payment toward the dollar-denominated enforcement judgment (i.e., £1 = \$2.20), but credited the pounds at the exchange rate prevailing on the date of payment (i.e., £1 = \$1.20) and declared \$236,000 still owing. On appeal, the U.S. Court of Appeals for the Second Circuit (per Newman, J.) affirmed and *held*: that under New York law, entry by a federal district court of a judgment enforcing a foreign judgment creates a new legal obligation in dollars which can be satisfied only by payment of the dollar amount obtained by using the exchange rate in effect at the time of the foreign judgment.

Defendant's Rule 60(b) motion was not an appeal on the merits of the case, but rather a plea to be excused from paying the American judgment on the ground that the underlying English judgment had been satisfied in English currency. Thus, under the rule of *Erie Railroad v. Tompkins*,¹ the district court had to decide a question under New York law that New York's highest court had never faced.

In affirming the district court's decision, the appellate court compared the effects that different currency conversion dates have on an American judgment enforcing a foreign court award. Under the "breach-day" rule adopted by New York courts, foreign currency is converted at the exchange rate prevailing on the day the legal obligation becomes due—in this case, the day the English judgment was entered. The court of appeals characterized New York's breach-day conversion rule as reflecting a policy of creditor's choice, intended to protect the creditor from the loss of judgment value when a foreign currency depreciates relative to the dollar pending enforcement in U.S. court. Thus, in this case, the breach-day rule protected the creditor from the depreciation of the pound, by giving him the option of collecting dollars at \$2.20 per pound in the United States, rather than executing on the English judgment in England, which, at the current exchange rate, would yield only \$1.50 per pound. The court observed, however, that apart from protecting the creditor from the effects of disadvantageous currency fluctuations, this rule also provides the creditor with a windfall if the foreign currency appreciates and the judgment debtor has property in both countries to satisfy the judgment. For example, in the case at bar, if the pound had appreciated from \$2.20 to \$2.50, the creditor would have had a choice between executing on the American judgment against the debtor's American property at £1 = \$2.20 or executing on the English judgment against the debtor's English property (if any) at £1 = \$2.50, a windfall gain.

The court remarked that the proposed *Restatement of Foreign Relations Law* goes even further in placing all exchange rate fluctuation risk on the debtor by allowing the American court to use the breach-day rule in the event of depreciation, and the American judgment date rule in the event of appre-

¹ 304 U.S. 64 (1938).

ciation, of the foreign currency.² The *Restatement* approach would allow the creditor to reap appreciation benefits even if the judgment debtor does not have sufficient property in *both* jurisdictions to satisfy the judgment. Under this rule, if the pound had appreciated in the case at bar, the creditor could have applied the more favorable rate in the United States, rather than going back to England, where the debtor might be judgment-proof.

According to the court, this "game of creditor's choice" made possible by the breach-day rule could be avoided by adopting a "neutral" conversion rule. It discussed three options: entry of the enforcing judgment in the currency of the foreign award—a rule currently in effect in several European states; conversion to dollars on the date of payment—the approach recently adopted by England in place of the breach-day rule;³ or conversion to dollars as of the date of the enforcing judgment—a rule applied in federal cases since 1926 and favored in the *Restatement (Second) of Conflict of Laws*.⁴ Unlike the breach-day rule, which always protects the creditor, these rules allow either party to speculate on and gain from favorable exchange rate fluctuations, but at the same time impose on both the debtor *and* the creditor the risk of unfavorable fluctuations.

Despite the court's belief that a more neutral conversion rule might be more appropriate, the court concluded that the creditor protection policy inherent in New York's breach-day rule would compel New York's highest court to require satisfaction of a New York enforcing judgment by payment of the dollar amount specified in that judgment. According to the court, since the breach-day rule protects the judgment creditor against fluctuations in currency values to the point of allowing him to speculate without risk, "[i]t would be anomalous to suggest that New York would allow its creditor's preference rule to be undercut by giving the judgment debtor the opportunity to satisfy his New York judgment by paying the underlying judgment in depreciated pounds."⁵ Thus, defendant was not excused from paying the difference between the pound and dollar judgments caused by the pound's depreciation pending payment. As a corollary, any pounds paid were to be credited in dollars at the rate prevailing on the date the pounds were paid.

The court rejected defendant's reliance on the general rule that a judgment debtor can choose which of two judgments on the same obligation he wishes to pay, a notion endorsed in U.S. domestic law.⁶ This rule arose in the context of two U.S. judgments—a context not involving dual-currency problems. The court opined that extension of this domestic rule to the international sphere would allow the *debtor* to speculate without bearing any risk. The court observed that there may be a legitimate debate whether the creditor should be allowed gains from fluctuation without risk (breach-day

² RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §823(1) comment c (Tent. Draft No. 6, 1985).

³ See *Miliangos v. George Frank (Textiles) Ltd.*, [1975] 3 All E.R. 801 (H.L.).

⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §144 comment g (1969); see *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926).

⁵ 783 F.2d 333, 339.

⁶ RESTATEMENT (SECOND) OF JUDGMENTS §18 comment j (1982).

rule) or with the fair risk of speculation (judgment-day rule), but it stated that there was no sound basis for selecting a rule of debtor's preference.

Finally, the court rejected defendant's contention that the district court's ruling conflicted with the New York Court of Appeals decision in *In re James' Will*.⁷ In *James*, after a judgment debtor failed to pay a New York judgment, the creditor obtained an enforcing judgment in France. The New York Court of Appeals held that the payment of the enforcing judgment in depreciated francs satisfied the New York judgment. According to the Second Circuit, *James* was not helpful to defendant because it merely held that under New York law the decision whether an enforcing judgment has been satisfied is to be made according to the law of the enforcing jurisdiction.

This decision reflects the Second Circuit's longstanding perplexity over currency conversion questions in the context of enforcing foreign awards.⁸ Most of the legal precedents in this area were settled before floating exchange rates became the norm. They set down simple, procedural rules for conversion, with little concern for the equitable consequences of such rules in a world of unstable currencies. Restricted by the procedural posture of the case, the court could only point out the hardship imposed by carrying the breach-day rule to its logical extreme, but could not disavow the rule entirely.

Customs Service—foreign affairs defense—detention of imported merchandise at the border—jurisdiction—Court of International Trade—political question doctrine

AZURIN v. VON RAAB. No. 86-0189.

U.S. District Court, D. Hawaii, June 6, 1986.

Plaintiffs, importing agents for Ferdinand Marcos, former President of the Philippines, filed a mandamus action against defendant, Commissioner of Customs of the U.S. Customs Service, seeking the release of Marcos's property detained by defendant in Honolulu, Hawaii. Defendant acknowledged that plaintiffs had complied with all formal requirements for the entry of the property but asserted that the Customs Service had a discretionary authority to detain property entering the country if its true ownership was in question. The court (per Fong, J.) rejected defendant's claim and *held*: that in the absence of a formal seizure of property pursuant to an investigation into whether the property was being imported in violation of U.S. law, the Customs Service could not detain goods in order to establish their true ownership.¹

⁷ 248 N.Y. 1, 161 N.E. 201 (1928).

⁸ See *Shaw, Savill, Albion & Co. v. The Fredericksburg*, 139 F.2d 952 (2d Cir. 1951) (in which Judge Frank saw difficulties of Einsteinian dimension); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981) (applying the New York rule), *cert. denied*, 459 U.S. 976 (1982).

¹ Defendant appealed Judge Fong's ruling to the Ninth Circuit and obtained a stay of the order pending appeal. The Ninth Circuit has agreed to expedite the appeal. In the meantime, other courts have addressed similar issues and reached different results. For example, on June 17, 1986, Judge Pfaelzer in the U.S. District Court for the Central District of California issued

This case arose out of the attempt by Ferdinand Marcos to enter into the United States certain property brought with him in flight from the Philippines. On Marcos's arrival in Honolulu, customs officers took custody of the property, examined it and determined the procedures to be followed for its entry. Marcos's agents filled out the required forms and provided all information requested by the officers relating to the proper value and classification of the property. The customs officers processed the property and determined the duties to be assessed on it. However, before notifying plaintiffs of the amount of duty owed, the officers were instructed by the Washington office of the Customs Service, apparently without any explanation, not to release the property. Plaintiffs, unable to obtain the property, filed mandamus actions in both the U.S. District Court for the District of Hawaii and the U.S. Court of International Trade (CIT) seeking an order compelling the Commissioner of Customs to release the goods.

As a threshold matter, the court had to determine which forum—the district court or the CIT—had proper jurisdiction over plaintiffs' action. The court began its analysis by noting that the jurisdiction of the CIT carves out a limited exception to the "broader grant of jurisdiction to the district courts."² For the CIT to assert jurisdiction over an action, the action must arise out of customs or international trade laws. After examining the relevant customs laws and regulations, the court concluded that those laws did not specify a positive duty to release property under these circumstances. Therefore, the CIT did not have jurisdiction. In contrast, the district court possessed a broader jurisdiction, deriving from sources other than customs and international trade laws. Under this more inclusive authority, the district court could assert jurisdiction over the action.³

Turning to the merits, the court addressed defendant's argument that the Customs Service had discretionary authority to detain goods whose true ownership was in question. Defendant argued that this authority derived from three sources. First, defendant claimed that 19 U.S.C. §482 gave the Customs Service the right to seize and detain any property that it had reason to believe was being imported in violation of the laws of the United States, such as the National Stolen Property Act, 18 U.S.C. §2314. The court agreed that defendant had such authority, but pointed out that defendant's own attorneys admitted they had not "seized" the property pursuant to an investigation into possible violation of U.S. law. In the absence of a formal seizure and investigation, 19 U.S.C. §482 did not authorize the Customs Service to detain goods whose ownership was in doubt.

a preliminary injunction in a suit brought by the Philippine Government, *Republic of the Philippines v. Marcos* (No. 86-3859), prohibiting Marcos from receiving or obtaining possession of various property. It is not clear whether Judge Pfalzer's order applies to property in dispute in *Azurin v. Von Raab*.

² No. 86-0189, slip op. at 6.

³ *Id.* at 7. In finding for the plaintiff, the court implicitly accepted plaintiff's position that defendant had a duty to release the property. However, the court never clearly identified the precise law upon which defendant's duty was based. In the end, the court appears to have relied on defendant's own admission that once the Customs Service determined that the goods could enter the country legally, it had a duty to release the goods.

Second, defendant relied on the fact that Congress in 1983 repealed 19 U.S.C. §1483, a provision of U.S. customs law that had arbitrarily designated the consignee of merchandise entering the United States as the "owner" for customs purposes. Defendant contended that Congress, in repealing the provision, intended to give the Customs Service discretionary authority to detain property pending a determination of true ownership. To evaluate this claim, the court first examined the long history of customs practice, which had been codified in 19 U.S.C. §1483. The court noted that for over 150 years, "[i]dentification of the actual owner of the merchandise was irrelevant for Customs purposes" Moreover, "[t]he wisdom of this statutory scheme is obvious. By designating the consignee as owner of the merchandise for Customs purposes . . . , Customs concerned itself only with collecting duty and not with property disputes."⁴ The court then examined the legislative history of the 1983 repeal and found no explanation of why the statutory designation of ownership had been eliminated. Therefore, the court concluded, Congress must not have intended to upset the longstanding practice of ignoring true ownership. Instead, it simply meant "to expand the number of categories of persons who were eligible to make entry and who would be liable for duty."⁵

Third, the court addressed the argument made by defendant that its authority to detain Marcos's property derived from the executive branch's power over foreign affairs. This power, defendant claimed, permitted the Executive to take "actions in furtherance of foreign policy interests which affect the rights of private citizens."⁶ The court responded simply that such an exercise of power would have to be pursuant to an agreement or executive order signed by the Chief Executive. "This court will not usurp the foreign affairs powers of the executive branch; neither, however, will it attempt to implement that authority in the absence of a definitive statement of the exercise of such power by way of executive order or treaty."⁷

Finally, defendant argued that the court should not involve itself in this controversy since any ruling would "upset the delicate balance of American foreign relations."⁸ Noting that this argument might be successful if the position of the executive branch was clearly established, the court observed that "the executive branch simply has not taken any definite position with respect to the detention of this merchandise."⁹ In fact, contradictory statements had been issued by different offices of the Executive. Therefore, the court had no obligation to refrain from deciding the issues. Having already determined that defendant did not have the discretionary authority it claimed, the court therefore granted plaintiffs' motion and issued a writ of mandamus.

The ruling in *Azurin v. Von Raab* is an attempt to assure the accountability of Customs Service actions. The court was clearly concerned that while for-

⁴ *Id.* at 14-15.

⁶ *Id.* at 19.

⁸ *Id.* at 20.

⁵ *Id.* at 15.

⁷ *Id.*

⁹ *Id.* at 21.

mal procedures were available to the Executive that would have permitted defendant to achieve its purported goal—to detain Marcos's property long enough to determine its true ownership—defendant nevertheless insisted that the Customs Service had a discretionary, essentially unchecked power to do the same. If the court had accepted defendant's position, it would have opened the door to further discriminatory, politically based actions. But the ruling also addressed the court's view of the appropriate role of the Customs Service. By suggesting that it should avoid property disputes and foreign policy matters, the court appeared to be endorsing a view that the Customs Service should limit itself to the ministerial office of collecting duties on property entering the United States. This view seems to be in conflict with recent efforts by the Customs Service to take a more active position in foreign policy matters.

Forum non conveniens—conditional dismissal of tort claim by foreign plaintiffs

IN RE UNION CARBIDE CORP. GAS PLANT DISASTER AT BHOPAL, INDIA IN
DECEMBER 1984. 634 F.Supp. 842.
U.S. District Court, S.D.N.Y., May 12, 1986, as amended June 10, 1986.

In December 1984, a highly toxic gas leaked from a chemical plant owned and operated by Union Carbide India Ltd. (UCIL) and caused disastrous injuries to the population of the city of Bhopal, India. UCIL was incorporated and licensed under the laws of India, but was a subsidiary of Union Carbide Corporation, a New York corporation that owned 50.9 percent of UCIL's stock. Within a week after the accident, the first lawsuits on behalf of Indian victims were filed against Union Carbide in various U.S. courts. In February 1985, the U.S. Judicial Panel on Multidistrict Litigation decided to centralize all actions related to the Bhopal accident in the Southern District of New York.¹ Pursuant to special legislation enacted by the Indian Parliament, the Indian Government joined the litigation as coplaintiff in April 1985.² Upon motion by defendant Union Carbide, the district court (per Keenan, J.) dismissed the consolidated case on the ground of *forum non conveniens* and *held*: that "the Indian legal system is in a far better position than the American courts to determine the cause of the tragic event and thereby fix liability."³

¹ 601 F.Supp. 1035 (J.P.M.D.L. 1985).

² The Bhopal Gas Leak Disaster (Processing of Claims) Act, Indian Parliament Act No. 21 of 1985, entered into force Feb. 20, 1985, GAZETTE OF INDIA (EXTRAORDINARY), pt. 2, sec. 2, Mar. 29, 1985 [hereinafter the Bhopal Act], granted the Indian Government the exclusive right to represent the victims of the Bhopal accident within and outside India. With regard to litigation in courts outside India pending at the time of the Act's entry into force, §3(3) of the Bhopal Act provides that the Indian Government "shall represent, and act in place of, or along with," any Indian plaintiff if the foreign courts so permit. The Bhopal Act also required the Indian Government to establish a scheme for the registration and processing of claims arising out of the accident as well as the disbursement and apportionment of amounts received in satisfaction of the claims. *Id.* §9. Reportedly, over 487,000 claims have been filed in India pursuant to this scheme.

³ 634 F.Supp. 842, 866.

The dismissal, however, was conditioned on defendant's consent (1) to submit to the jurisdiction of Indian courts and to waive any statute of limitations defense; (2) to satisfy any judgment rendered by an Indian court against the parent company when upheld on appeal "where such judgment and affirmance comport with the minimal requirements of due process";⁴ and (3) to provide discovery "under the model of the United States Federal Rules of Civil Procedure after appropriate demand by plaintiffs."⁵

The district court analyzed the *forum non conveniens* issue by referring to the tests set forth by the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*⁶ and *Piper Aircraft Co. v. Reyno*.⁷ Thus, the court applied the principle that "[t]he doctrine of *forum non conveniens* allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute,"⁸ if there is another adequate forum to which the defendant is amenable. Relying on *Piper*, the court observed that a foreign plaintiff's choice of forum deserves less deference than a U.S. plaintiff's choice of his home forum. The court acknowledged that differences in the substantive or procedural laws between the two forums might make it preferable for the plaintiff to pursue its claim in one forum rather than another; however, as observed in *Piper*, such preferences are not to be given substantial weight in a *forum non conveniens* analysis unless the change of law occasioned by the transfer to the other forum leaves the plaintiff without any remedy at all.

After an extensive review of differences between the Indian and U.S. legal systems in areas such as substantive tort law, organization of the bar and litigation of complex cases, as well as the procedural aspects and practical capacity of Indian courts, the court concluded that India offered an adequate alternative to litigation in the United States. In particular, the court noted that the Indian legislature had already demonstrated "imagination" as well as "creativity and flexibility"⁹ in responding to the emergency by enacting special procedures to deal with the Bhopal claims. In addition, concerns with regard to limitations on discovery under Indian law could be alleviated by conditioning dismissal on Union Carbide's consent to submit to U.S. discovery rules after transfer to India. This procedure was predicated on the *Piper* decision, which indicated that "[i]n the future . . . district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims."¹⁰ Similarly, although Union Carbide had not yet objected to the jurisdiction of the Indian courts, the court required defendant to stipulate to its amenability to process in India and to abide by any final Indian decision.

The court then considered whether private and public interest factors should bar dismissal. The court noted that the bulk of the evidentiary material bearing on liability was to be found in India, most of the potential witnesses were located in India and a viewing of the site might be necessary. Therefore,

⁴ *Id.* at 867.

⁶ 330 U.S. 501 (1947).

⁸ 634 F.Supp. at 845 (paraphrasing *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 507).

⁹ 634 F.Supp. at 848.

⁵ *Id.*

⁷ 454 U.S. 235 (1981).

¹⁰ 454 U.S. at 257 n.25.

the court reasoned, litigation in India would greatly diminish transmittal, translation and travel problems. With regard to public interest concerns, the court observed that litigating the *Bhopal* case in the United States would entail considerable administrative difficulties and expense. The court also recognized the interest of the Indian Government in enforcing its own environmental, health and safety regulations and noted that under a variety of rules relating to the conflict of laws, Indian law was likely to be the applicable law. In response to the plaintiffs' argument that a U.S. multinational corporation should be amenable to process in a U.S. court for accidents that occur abroad, the court agreed that there was a "moral danger of creating [a] 'double-standard' " of liability for multinational corporations if the Bhopal victims received less favorable treatment than American victims of industrial accidents.¹¹ Nonetheless,

when an industry is as regulated as the chemical industry is in India, the failure to acknowledge inherent differences in the aims and concerns of Indian, as compared to American citizens would be naive, and unfair to defendant. . . . This Court . . . thinks that it should avoid imposing characteristically American values on Indian concerns.

The Indian interest in creating standards of care, enforcing them or even extending them, and of protecting its citizens from ill-use is significantly stronger than the local interest in deterring multinationals from exporting allegedly dangerous technology.¹²

Finally, the court offered a few concluding remarks regarding a broader perspective that also endorsed dismissal of the action:

The Court thus finds itself faced with a paradox. In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947.¹³

It is, of course, anomalous that the Indian Government should have vigorously argued in this case that the Indian judicial system was inadequate to handle the *Bhopal* litigation. No doubt the prospect of obtaining higher damages under U.S., as opposed to Indian, law may have been a consideration for adopting this line of argument. While Judge Keenan concluded that U.S. courts were not convenient, he nevertheless required the U.S. defendant to submit expressly to the jurisdiction of the foreign courts, with the commit-

¹¹ 634 F.Supp. at 865.

¹² *Id.*

¹³ *Id.* at 867.

ment to provide broad discovery and satisfy any final judgments against the U.S. defendant that comport with minimal requirements of due process. In this respect, his decision is in line with other cases in which U.S. courts have conditioned *forum non conveniens* dismissals on various stipulations by the defendants.¹⁴ It is interesting to note that Judge Keenan's decision might encourage foreign plaintiffs to bring actions in the United States for the purpose of obtaining conditions imposed in a *forum non conveniens* dismissal and thus improving the prospects for recovery or settlement abroad. However, before imposing such conditions, a U.S. court has to satisfy itself that it has jurisdiction and venue to hear the case on the merits, since "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue."¹⁵

Antisuit injunction—parallel litigation in U.S. and Canadian courts—comity

GANNON v. PAYNE. 706 S.W.2d 304.
Supreme Court of Texas, March 12, 1986.

This litigation arose from a joint venture between Fred G. Gannon, a Canadian citizen, and Robert B. Payne, a Texas resident, for the acquisition of a share in an oil and gas lease in Alberta, Canada. After Gannon unilaterally reduced Payne's share of the proceeds, Payne sued in Canada. In 1980, the Canadian court granted some, but not all, of the relief sought by Payne. Payne did not appeal. However, in 1982, he sued Gannon again, this time in a state court in Texas, seeking in part recovery on claims similar to those that had been the subject of the Canadian suit. After approximately 2 years of preliminary proceedings in Texas, Gannon filed suit in Canada for a declaratory judgment that certain matters raised in the Texas litigation had already been decided in the prior Canadian litigation. The Texas court then issued a temporary injunction prohibiting Gannon from proceeding with his suit in Canada. This injunction was initially dissolved by the Texas court of appeals but was reinstated on rehearing.¹ The Texas Supreme Court (per Kilgarlin, J.) reversed and *held*: that the trial court had abused its discretion in granting the antisuit injunction since "[o]nly in exceptional situations should a trial court issue an injunction prohibiting a foreign citizen from prosecuting an action in his home country."²

The Texas Supreme Court first distinguished the issue of whether a court may properly enjoin persons subject to its jurisdiction from pursuing litigation in a foreign forum from situations involving parallel litigation in two domestic courts. In this regard, the court observed that "the policy of allowing parallel court proceedings to continue simultaneously [when the other court involved

¹⁴ See Fitzpatrick, "Reyno": Its Progeny and Its Effects on Aviation Litigation, 48 J. AIR L. & COM. 539, 542 (1983).

¹⁵ Gulf Oil Corp. v. Gilbert, 330 U.S. at 504.

Plaintiffs appealed the order in its entirety (No. 86-318 (2d Cir. 1986)). Union Carbide appealed the condition requiring only Union Carbide to abide by U.S. discovery rules but not the Indian Government. The Indian Government cross-appealed.

¹ 695 S.W.2d 741 (Tex. App. [5th Dist.] 1985).

² 706 S.W.2d 304, 308.

is a foreign court] requires more scrupulous adherence.”³ The court also observed that the principle of comity required restraint, since one of the courts might respond to an antisuit injunction by issuing a similar injunction against the other proceeding, thereby deadlocking the litigation.⁴

The court proceeded to review the grounds upon which an antisuit injunction might be appropriate despite the principle of comity. The court first observed that the Canadian suit was not primarily intended to interfere with the Texas proceeding and noted that the Texas court could have protected its jurisdiction in a manner less obtrusive than an absolute prohibition of the continuation of the Canadian suit. Second, the court noted that the multiplicity of suits, in itself, was not a sufficient reason for granting an antisuit injunction, particularly because, pursuant to the rules on the recognition and enforcement of final foreign judgments, a court involved in parallel litigation will usually respect a prior judgment by the other court if all requirements for recognition are met. With this safeguard in mind, the court considered the risk of inconsistent judgments to be greatly reduced. Third, in response to the contention that the costs incurred by Payne in pursuing his claims in Texas would be wasted were the Canadian proceedings allowed to continue, the court opined that if an increase in cost, in itself, were considered to warrant an injunction, such a remedy would be proper in all cases, which it clearly is not. Moreover, the court found no indication that the Canadian suit was vexatious or harassing. On these grounds, the court concluded that the trial court had abused its discretion in issuing an antisuit injunction, particularly in light of the fact that prior litigation of similar issues between Gannon and Payne had occurred in Canada.⁵

In this case of first impression for the Texas Supreme Court, the potentially vexing issue of concurrent jurisdiction was convincingly resolved before it developed into a clash between Texan and Canadian courts. The high court showed greater sensitivity for international concerns and less inclination to parochialism than the courts below. Since the issue at stake did not involve conflicting national policies or controversial and politically charged matters, as were presented in the highly publicized *Laker* litigation,⁶ the court was able to find a solution consistent “with the normal relations between states and between courts of friendly states.”⁷

³ *Id.* at 306.

⁴ See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (definition of comity); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926, 927 (D.C. Cir. 1984), summarized in 78 AJIL 666 (1984).

⁵ It is interesting to note that one court of appeals judge, dissenting from the decision reinstating the temporary injunction, would have found that the trial court had abused its discretion under the doctrine of *forum non conveniens* “if it enjoin[ed] a proceeding concerning the same subject matter in a convenient foreign jurisdiction.” 695 S.W.2d at 750 (Akin, J., dissenting).

⁶ 731 F.2d 909 (D.C. Cir. 1984); see *supra* note 4.

⁷ RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §403 Reporters’ Note 7 (Tent. Draft No. 7, 1986) (*Laker* litigation as an example for enjoining exercise of jurisdiction in other states).

DECISION OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL

Expropriation—standard of compensation under international law

SEDCO, INC. v. NATIONAL IRANIAN OIL CO. ITL 59-129-3.

Iran-United States Claims Tribunal, The Hague, March 27, 1986.

SEDCO, Inc., a U.S. company, filed a claim before the Iran-United States Claims Tribunal¹ against respondents, the National Iranian Oil Company and the Islamic Republic of Iran, seeking compensation for the nationalization of SEDCO's shareholder interest in SEDIRAN Drilling Company. In a previous interlocutory award, Chamber Three had found that it had jurisdiction over SEDCO's claim and that the company's shareholder interest had been expropriated by Iran.² In the present award, Chamber Three (per Mangard, Chairman) addressed the standard of compensation to be applied in determining damages resulting from the expropriation and *held*: that SEDCO was entitled to be compensated for the full value of its equity interest in SEDIRAN. The opinion was joined by Arbitrator Brower, who filed a lengthy separate opinion. The Iranian member, Arbitrator Moin, dissented but at the time of this writing had not yet circulated a separate opinion.

SEDCO owned a 50 percent share of SEDIRAN and controlled its operations in Iran through the 1970s. With the upsurge of unrest in Iran in late 1978, SEDCO removed its expatriate personnel, and operations ceased in early 1979. On request from the Iranian Government, SEDIRAN resumed partial operations in March 1979, although SEDCO notified the Government that certain drilling rigs could not be operated without the return of expatriate personnel. Respondents then canceled the contracts as to the inoperative rigs and began operating the rigs themselves. In the summer of 1979, the Iranian Government requested that a SEDCO supervisor be located in Iran. In response, SEDCO asked for information concerning the number of rigs still needed. Instead of responding, in the fall of 1979 the Iranian Government appointed "provisional directors" of SEDIRAN to replace those appointed by SEDCO, as well as a supervisor of SEDIRAN's drilling operations. Having received no favorable reply to its request for information, SEDCO terminated its contract in November 1979. On August 2, 1980, the Iranian Government ordered the transfer of SEDCO's ownership shares of SEDIRAN to the Government. At the same time, SEDIRAN's drilling rigs and other equipment were retained and used by respondents.

Before Chamber Three, claimant contended that the expropriation claim was governed by the Treaty of Amity between the United States and Iran, which provides in relevant part:

¹ For background information on the Iran-United States Claims Tribunal, see 77 AJIL 642 (1983).

² SEDCO, Inc. v. National Iranian Oil Co., [Interlocutory Award No.] ITL 55-129-3 (Oct. 28, 1985) (Chamber 3).

[P]roperty [of nationals or companies of either of the contracting parties] shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.³

Relying on its recent award in *Phelps Dodge Corp.*, the Chamber found that Article IV(2) of the Treaty of Amity was "clearly applicable" at the time SEDCO's claim arose, and thus was a "relevant source of law."⁴

Since respondents argued that the Treaty merely incorporated the standards of compensation required under customary international law, the Chamber found it necessary to review those standards. The Chamber first observed that as of the date of the Treaty, the traditional principle of "full compensation" was the customary standard. Respondents argued that this standard had eroded in recent years and was no longer applicable. In response, the Chamber noted that deriving general principles of law from the conduct of states in lump sum or negotiated settlements in other expropriation cases was difficult because of the "questionable evidentiary value . . . of much of the practice available."⁵ The Chamber observed that "lump sum" agreements between states and settlements negotiated between states and foreign companies are often motivated primarily by nonjuridical considerations, making it difficult to derive standards of international law from such agreements and settlements. Likewise, the Chamber found that bilateral investment treaties, whose language often reflects the respective bargaining positions and concerns of the states involved, were not reliable evidence of customary international standards of compensation.

In addition, the Chamber noted that United Nations General Assembly resolutions discussing the standard of compensation are not binding on states and cannot be considered evidence of customary law, although they may "reflect" such law where there is a degree of unanimity in their adoption. The Chamber concluded that only one UN resolution referred to by respondents—Resolution 1803 of 1962—had been approved by a sufficiently broad majority of states to reflect current international legal standards. Resolution 1803 provides in relevant part that where nationalizations occur, "the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures . . . and in accordance with international law."⁶

³ Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States of America-Iran, Art. IV(2), 8 UST 899, TIAS No. 3853, 284 UNTS 93.

⁴ ITL 59-129-3, slip op. at 6-7 (quoting *Phelps Dodge Corp. v. Islamic Republic of Iran*, AWD 217-99-2 (Mar. 19, 1986) (Chamber 2)).

⁵ Slip op. at 8.

⁶ GA Res. 1803, 17 UN GAOR Supp. (No. 17) at 15, UN Doc A/5217 (1962), *reprinted in* 57 AJIL 710 (1963).

The Chamber observed that scholars suggesting that Resolution 1803 demonstrated a change in the traditional "full compensation" standard have focused primarily on the context of "a formal systematic large-scale nationalization, *e.g.*, of an entire industry or a natural resource."⁷ This was not pertinent in the present case, where a discrete expropriation of specific property had occurred. In such circumstances, the overwhelming majority of both arbitral decisions and publicists—including those sympathetic to the view that the compensation standard for large-scale nationalizations has changed—have concluded that "full compensation should be awarded for the property taken."⁸ Indeed, in an earlier decision the Tribunal itself had concluded that full compensation was appropriate,⁹ while in yet another case the Tribunal had awarded full compensation for a lawful nationalization of an entire industry, measuring the compensation in terms of the value of the nationalized company as a going concern.¹⁰

Arbitrator Brower wrote a lengthy concurring opinion following the same rationale. He observed that the Treaty of Amity has never been abrogated formally by the parties, and that neither the decline in U.S.-Iranian relations since the 1979 revolution nor the Claims Settlement Declaration that created the Tribunal in 1981 constituted an abrogation. Arbitrator Brower exhaustively reviewed the negotiating history and language of the Treaty, which led him to conclude that, at the time the Treaty was entered into, both parties understood its terms to require "full compensation in the event of a taking."¹¹

On the basis of this interpretation, Arbitrator Brower determined that reference to the customary international law standard of compensation was unnecessary. Nonetheless, he scrutinized that standard and concluded, on the basis of previous arbitral decisions, the relevant United Nations resolutions and the growing investment treaty practice among states, that "full compensation" continued to be the proper criterion. He deviated somewhat from the majority opinion by concluding more firmly that, whether or not the expropriation occurred in the course of a "programmatic nationalization," the full compensation standard still applied. He noted that in *American International Group v. Islamic Republic of Iran*,¹² the Tribunal already had concluded that full compensation—which included the value of the expropriated company as a going concern—was proper in the case of a large-scale nationalization of the Iranian insurance industry. Finally, Arbitrator Brower turned to the question, raised by claimant, whether the taking was unlawful.

⁷ Slip op. at 11.

⁸ *Id.* at 11. *Accord* *Libyan American Oil Co. v. Libyan Arab Republic*, Award of Apr. 12, 1977, reprinted in 20 ILM 1 (1981), 62 ILR 140 (1982). See also I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 538 (1979).

⁹ *Tippets, Abbott, McCarthy, Stratton v. Islamic Republic of Iran*, AWD 141-7-2, at 10 (June 29, 1984) (Chamber 2).

¹⁰ *American International Group v. Islamic Republic of Iran*, AWD 93-2-3 (Dec. 19, 1983) (Chamber 3), reprinted in 4 IRAN-U.S. CLAIMS TRIBUNAL REP. 96 (1983 III).

¹¹ Separate Opinion of Arbitrator Brower at 10.

¹² See note 10 *supra*.

CURRENT DEVELOPMENTS

INTERNATIONAL LAW AND U.S. WITHHOLDING OF PAYMENTS TO INTERNATIONAL ORGANIZATIONS

On March 12, 1986, Ambassador Vernon A. Walters, the United States representative at the United Nations, said:

[T]he prospect is for the withholding by the United States of a very sizable amount . . . This inevitably would raise the question of whether the non-payment of a substantial amount could constitute a material breach of the United States obligation under Article 17 of the U.N. Charter to pay our duly assessed share of the U.N. budget. This is an issue of which we must be aware.¹

The purpose of this Note is to contribute to that awareness.

Unilateral United States Withholdings

United States withholdings of payments to international organizations may be divided into three categories: (1) specific (or surgical) cuts aimed at particular programs; (2) contingent withholdings that will only take effect if certain circumstances develop; and (3) nonspecific, noncontingent across-the-board cuts (the Gramm-Rudman-Hollings withholdings).

Withholding of Specific Assessed Contributions. In recent years, the United States has enacted legislation requiring certain specific withholdings from its assessed contribution to the United Nations budget. These have the effect of reducing the total U.S. contribution to the UN budget by an amount corresponding to the U.S. share (25 percent) of the appropriation for the UN activity in question, as authorized by the General Assembly. Among the UN activities affected by these withholdings are the following:

(1) funds budgeted for the Committee on the Exercise of the Inalienable Rights of the Palestinian People, for the Special Unit on Palestinian Rights, and for benefits for the Palestine Liberation Organization or the South West Africa People's Organization;² and

¹ Prepared testimony of Vernon A. Walters before a joint meeting of the Subcomms. on Human Rights and International Organizations and on International Operations of the House Comm. on Foreign Affairs, at 3 (Mar. 12, 1986).

² 22 U.S.C. §287e note (1983 Supp.) (Pub. L. No. 98-164, sec. 114, 97 Stat. 1017, 1020, approved Nov. 22, 1983). See also Pub. L. No. 98-473, sec. 529, 98 Stat. 1837, 1900, approved Oct. 12, 1984, and Pub. L. No. 99-83, sec. 403, 99 Stat. 190, 219, approved Aug. 8, 1985, which both require withholding from the U.S. contribution to international organizations the proportionate share for programs to benefit the PLO, SWAPO or "Libya, Iran, or Cuba." Pub. L. No. 99-190, sec. 528, 99 Stat. 1185, 1307, approved Dec. 19, 1985, adds that the U.S. proportionate share may be withheld, "at the discretion of the President, [for programs to benefit] Communist countries listed in section 620(f) of the Foreign Assistance Act of 1961, as amended."

(2) funds budgeted for the Second Decade to Combat Racism and Racial Discrimination, for implementation of General Assembly Resolution 3379 (XXX) (the "Zionism as racism" resolution), and for construction of a conference center in Addis Ababa for the Economic Commission for Africa.³

Some members of Congress supported these withholdings by arguing that the appropriations in question represent *ultra vires* acts by the United Nations, acts inconsistent with the Charter. To many, however, the withholdings simply represent U.S. (largely congressional) political disapproval of the affected activities.

Assessed contributions have also been specifically withheld for the Preparatory Commission implementing the 1982 Law of the Sea Convention. These withholdings are not based on legislative mandate. Rather, the United States argues specifically that although the funding is authorized by the UN General Assembly, the institutions created by the treaty, to which the United States is not a party, are not organs of the United Nations.

Contingent Withholdings. Contingent in name only, given the condition it imposes, the "Kassebaum amendment"⁴ requires a reduction of the U.S. share of the assessed contributions to the budgets of the United Nations and its specialized agencies from 25 to 20 percent unless those organizations adopt weighted voting—based on the amount of a member's contribution—on budgetary questions. The share reduction would take effect beginning with fiscal year 1987 contributions. This action was taken "[i]n order to foster greater financial responsibility" by international organizations.

The adoption of weighted voting in the plenary of the General Assembly would require amendment of Article 18 of the Charter, which gives each member one vote without regard to any criteria, financial or otherwise. Budgetary questions are listed among the "important" matters requiring a two-thirds majority in the Assembly for passage. Charter amendments also require a two-thirds vote in the Assembly, plus ratification by two-thirds of the member states, including all five permanent members of the Security Council. The prevailing view among knowledgeable students of the United Nations is that, in practical terms, the adoption of weighted voting is impossible.

Moreover, the adoption of weighted voting in the Assembly would probably be viewed as constituting an unacceptable erosion of a foremost principle of the United Nations, namely, that "[t]he Organization is based on the principle of the sovereign equality of all its Members."⁵ This principle is nowhere stronger than in the Assembly, where the views of the weakest states carry the same weight as those of the most powerful. The arguable exceptions to the sovereign equality principle in the United Nations proper—the veto power in the Security Council and the limited membership of the

³ 22 U.S.C. §287e note (West Supp. 1986) (Pub. L. No. 99-93, sec. 144, 99 Stat. 405, 424, approved Aug. 16, 1985).

⁴ 22 U.S.C. §287e note (West Supp. 1986) (Pub. L. No. 99-93, sec. 143, 99 Stat. 405, 424 (1985)).

⁵ UN CHARTER art. 2, para. 1.

other principal organs—were agreed to at the same time as the sovereign equality principle, and can thus be viewed as compatible with it. There are examples of weighted voting based on financial contributions in the extended UN system: in the World Bank, the International Monetary Fund and the International Fund for Agricultural Development.

In congressional debate on the Kassebaum amendment, there was only the briefest mention of its international law ramifications. Senator Richard G. Lugar, Chairman of the Foreign Relations Committee, said that “in a technical sense,” the amendment would violate a U.S. treaty obligation.⁶ Nevertheless, it passed both Houses rather easily.

When he signed the amendment into law in August 1985, President Reagan expressed reservations, saying that it raised “serious problems.” He said that its conditions “may be impossible to meet within the period of time indicated,” and that “it may be necessary to seek legislative changes.” He also said, by “requiring reductions in U.S. payments, . . . [a]ctivities of these organizations of importance to the United States could be deleteriously affected as a result.”⁷

In a letter to Secretary of State George P. Shultz in November 1985, Representatives Dan Mica and Gerald Solomon said that the “fundamental goal” of the Kassebaum amendment was “the establishment of UN agency decisionmaking procedures that would assure a more proportionate influence on the part of the major donors” in budgetary matters. They said that the creation of a group of experts to recommend reforms, as well as “immediate budgetary management improvements,” would be “a persuasive demonstration of the UN’s resolve to satisfy the intent of the law.” These actions, they said, would cause them to “consider supporting legislation to extend by one year” the implementation of the amendment.⁸

Ambassador Walters, at the resumed 40th session of the General Assembly in April 1986, remarked that “a Charter amendment to produce so-called weighted voting was not the only way in which the intent of the Kassebaum Amendment could be addressed.”⁹ The United States was encouraged, he said, by the establishment in late 1985 of the Group of High-level Intergovernmental Experts (Group of 18) to review the administrative and financial functioning of the United Nations.¹⁰

⁶ 131 CONG. REC. S7794 (daily ed. June 7, 1985). The conference committee also seemed to recognize a legal obligation: “To the extent that rapid and meaningful progress toward reform in budgetary voting rights is accomplished, the managers intend that the United States fulfill its obligations to the United Nations.” H.R. REP. NO. 240, 99th Cong., 1st Sess. 70 (1985).

⁷ Statement by the President after signing H.R. 2068, White House press release, Aug. 17, 1985, at 1.

⁸ Letter dated Nov. 14, 1985. Rep. Mica chairs the House Foreign Affairs Subcommittee on International Operations; Rep. Solomon is ranking minority member of the Subcommittee on Human Rights and International Organizations. Both were U.S. delegates to the 40th and resumed 40th sessions of the General Assembly.

⁹ UN Doc. A/40/PV.127, at 58 (1986).

¹⁰ The Group of 18 is expected to report to the General Assembly in September 1986. In January and March 1986, UN Secretary-General Javier Pérez de Cuéllar put certain savings

In the fiscal 1987 budget submitted to Congress, the U.S. administration, anticipating implementation of the Kassebaum amendment, requested a funding reduction in the amount of \$79.134 million for international organizations, of which \$42.055 million would apply to the UN regular budget.

A contingent measure known as the "Sundquist amendment,"¹¹ which would result in a specific withholding, is a protest against the alleged practice of Soviet-bloc countries requiring their nationals in the UN Secretariat to relinquish part of their salaries to their governments. In the absence of "substantial progress" in "correcting this practice," the amendment would require withholding the U.S. proportionate share of the UN salaries of such officials. President Reagan also expressed a reservation about the Sundquist amendment, saying that it "assumes that the United Nations can determine whether and the extent to which" the alleged practice takes place, and that the United Nations can correct it. "The difficulties in administering [the provision] may require some modification of it at a later date."¹²

Another potential withholding specifies that "[i]f Israel is illegally expelled, suspended, denied its credentials, or in any other manner denied its right to participate" in the General Assembly or any specialized agency, the United States would suspend its own participation, and "reduce its annual assessed contribution . . . by 8.34 percent for each month in which United States participation is suspended pursuant to this section."¹³

Gramm-Rudman-Hollings Withholdings. The cuts that result from execution of the Gramm-Rudman-Hollings Act¹⁴ are not tied to any specific congressional intent to withhold part of the U.S. assessed contributions to the United Nations, but rather to the effort to balance the federal budget through automatic, across-the-board cuts of "unprotected" budget items. Withholdings made pursuant to this legislation are not based on an *ultra vires* argument and do not represent political protestations, but are merely the result of internal budgetary convenience. UN assessed contributions are not "protected" budget items.

measures "into immediate effect" on his personal administrative authority. These included a freeze in recruitment, suspension of the promotion process, deferral of cost-of-living adjustments, reductions in travel and overtime costs, deferral of maintenance projects, and controls on documentation. UN Doc. A/40/1102, at 5 (1986). In addition, the Assembly acquiesced to the Secretary-General's request for adjustments in certain programs already approved, including curtailment of meetings and publications, and deferral of construction of the Addis Ababa and another conference center. *See id.* at 6; and UN Press Release WS/1284, May 16, 1986, at 2.

¹¹ 22 U.S.C. §287e note (West Supp. 1986) (Pub. L. No. 99-93, sec. 151, 99 Stat. 405, 428 (1985)).

¹² Statement by the President, *supra* note 7, at 1.

¹³ 22 U.S.C. §287 note (Supp. 1983) (Pub. L. No. 98-164, sec. 115, 97 Stat. 1017, 1021, approved Nov. 22, 1983), *as amended* by Pub. L. No. 99-93, sec. 142, 99 Stat. 405, 424 (1985). Presumably, the reduction percentage was designed to give the organization involved 12 months to reconsider or lose all U.S. funding.

¹⁴ Balanced Budget and Emergency Deficit Control Act of 1985 (Pub. L. No. 99-177, 99 Stat. 1037, approved Dec. 12, 1985, codified principally at 2 U.S.C. §901).

The immediate impact of Gramm-Rudman-Hollings was the retroactive withholding in December 1985 of \$19.9 million from the assessed U.S. contribution to the United Nations. This was roughly 10 percent of the U.S. total contribution, as compared to the standard 4.3 percent federal budget sequestration formula. In March 1986, the Reagan administration sent Congress a reprogramming request for Gramm-Rudman-Hollings mandated withholdings for the fiscal year 1986. Because some assessed contributions for fiscal 1986 had already been paid in full, the administration noted that the withholdings would not be allocated equally, and that the reprogramming request would reflect the administration's "desire to differentiate among agencies according to their responsiveness to U.S. interests" and to provide "incentives for cooperation."¹⁵ For the 1987 fiscal year, Gramm-Rudman-Hollings cuts from the UN budget of up to \$38 million are anticipated.

Focusing primarily on separation-of-powers issues, the Supreme Court decided the case of *Bowsher v. Synar* on July 7, 1986. Although the Court invalidated an important aspect of the Act's deficit reduction scheme, this was not expected to affect the achievement of its targeted budget cuts.¹⁶

Cancellation of Voluntary Contributions. Although this Note concentrates on withholdings from assessed contributions, a brief comment may be made about voluntary contributions. Members of the United Nations or specialized agencies are, of course, under no legal obligation to make voluntary contributions. However, once a commitment to contribute has been undertaken, a legal obligation may exist, especially after the beginning of the fiscal year for which the funds were pledged, for which they were then budgeted and during which they are being spent. The United States has canceled certain voluntary contributions in just such a manner, such as those for the UN Fund for Population Activities.^{16a}

International Law and Unilateral Withholdings

Article 17 and the Assessment Procedure. The basis of the argument that the recent, current and potential unilateral withholdings by the United States from its assessed contribution to the United Nations budget are contrary to

¹⁵ Prepared testimony of Alan L. Keyes, Assistant Secretary of State for International Organization Affairs, before a joint meeting of the Subcomms. on Human Rights and International Organizations and on International Operations of the House Comm. on Foreign Affairs, at 6 (Mar. 12, 1986). Under this plan, some organizations would be subject to the standard withholding (e.g., the World Health Organization); organizations "most responsive" to U.S. interests would be sequestered at 2.15% (e.g., the International Civil Aviation Organization); and organizations "least responsive" would be sequestered "in excess of 4.3 percent" (e.g., the United Nations, 6.96% withholding requested). This may conflict with the aims of the Act, section 252(e) of which specifies that it shall not be construed to give the Executive authority to "alter the relative priorities" in the budget.

¹⁶ See, e.g., *Gramm-Rudman Cutting Begins*, Wash. Post, July 23, 1986, at A5.

^{16a} But see *Population Council v. McPherson*, No. 85-6042 (D.C. Cir. Aug. 12, 1986) (upholding the authority, under U.S. law, of the executive branch to withhold pledged contributions to the UN Fund for Population Activities based on legislation specifically designed for that purpose).

its international legal obligations is found in the language of Article 17 of the United Nations Charter: "1. The General Assembly shall consider and approve the budget of the Organization. 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." The use of the word "shall," the *travaux préparatoires* and prevailing state practice in the United Nations tend to support the interpretation of resolutions adopted under Article 17 as binding.

Member state contributions are specified in a scale of assessments determined by the General Assembly. The Assembly uses an "ability to pay" formula based on each member's gross national income over a 10-year base period. At present, the U.S. share is 25 percent of the total assessed UN budget. The most recent scale of assessments was adopted in December 1985; the resolution was opposed by the United States and 14 other countries but passed easily.¹⁷

In practice, the United States percentage in the scale of assessments has been set through negotiations with the United Nations. In the Organization's earliest days, the U.S. contribution was slightly under 40 percent. It was lowered to 33.33 percent in 1954. In 1972, under pressure from Congress, it was lowered to 25 percent. In each instance, the United States was paying less than it otherwise would have under the "ability to pay" formula. The United States thus has been, and continues to be, the only member state required to pay proportionately less in relation to its economic strength.¹⁸

The Certain Expenses Opinion. In the early 1960s, after the General Assembly had authorized and funded the UN Emergency Force and the UN Operation in the Congo, the Soviet Union, France and several other countries objected and refused to pay a portion of their assessed contributions for those operations. This led in 1962 to the *Certain Expenses* Advisory Opinion of the International Court of Justice,¹⁹ requested by the Assembly at the urging of the United States. The Soviet Union argued that only the Security Council could fund peacekeeping operations—and only by special agreement with member states—and that the Assembly had acted beyond the scope of its legal authority. France argued that payment for such operations was voluntary, and that only states that had voted for their creation and continuation were obligated to pay. The United States argued that Article 17 was binding.

By nine votes to five, the Court held that expenditures for a General Assembly peacekeeping operation did constitute expenses of the Organization within the meaning of Article 17. The Court stated that the phrase "expenses of the Organization" included, on its face, all expenses and not only "regular" or "administrative" expenses, adding that no such qualifi-

¹⁷ GA Res. 40/248, Dec. 18, 1985. Those 15 countries were assessed some 79% of the regular UN budget.

¹⁸ The United States also pays less than a large number of other countries on a per capita income basis. On the other hand, 78 countries are assessed at the rate of only 0.01% each, and some two-thirds of UN members contribute a total of about 1% of the budget. It is this budgetary "disequilibrium" that some in Congress and the administration find most objectionable.

¹⁹ *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151 (Advisory Opinion of July 20).

cation was appropriate or justified. To determine the validity of expenditures authorized by the Assembly, the Court stated that they "must be tested by their relationship to the purposes of the United Nations." An expenditure not made for a purpose of the United Nations—as set forth in Article 1 of the Charter—would not be considered an "expense of the Organization."²⁰

The Court went on to state that even if it is alleged that the expenditure in question relates to an *ultra vires* act on the part of a UN organ—in this case, peace and security actions taken by the General Assembly—"this would not necessarily mean that the expense incurred was not an expense of the Organization. . . . [E]ach organ must, in the first place at least, determine its own jurisdiction."²¹

A majority of the Court took it as given that any expenditure assessed by the Assembly legally obligated members to pay. Dissenting judges noted that this reasoning could empower the Assembly to do virtually anything via the assessment route, as long as it purported to be acting to further a purpose of the United Nations.²² In written briefs and oral arguments offered by the United States in the *Certain Expenses* proceedings, the U.S. position on the binding nature of Article 17 of the Charter was emphatic. Moreover, following the announcement of the advisory opinion, Congress enacted an "expression of satisfaction" with the decision, saying that it provided "a sound basis for obtaining prompt payment of assessments . . . by making them obligations of all members of the United Nations."²³

Article 19: An Informal Agreement. The General Assembly subsequently adopted a resolution accepting the Court's opinion.²⁴ The United States supported the resolution; France and the Soviet Union opposed it. By 1964, the Soviet Union was sufficiently behind in payments that the provisions of Article 19 of the Charter came into play. Under Article 19, a member state in arrears in the payment of its assessed contributions "shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years." The Assembly may "permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member." The United States argued that the application of the loss-of-vote provision was automatic, subject only to the "conditions beyond the control" clause.

Initially, a "showdown" on the right of the United Nations "to tax its members" appeared imminent,²⁵ but the United States opted to avoid a confrontation when it began to realize that the days of the U.S. "automatic majority" in the Assembly were coming to an end. Instead, an informal agreement was reached whereby the Assembly would operate indefinitely without formal votes. The special nature of peacekeeping as a budget item,

²⁰ *Id.* at 167. The United States had asserted that only an "unlawful" expenditure could be challenged. *See, e.g.,* statement of Abram Chayes, Legal Adviser, Department of State, to the International Court of Justice, May 21, 1962, reprinted in 47 DEP'T ST. BULL. 30, 31 (1962).

²¹ 1962 ICJ REP. at 168.

²² *See, e.g., id.* at 239 (Moreno Quintana, J., dissenting).

²³ 22 U.S.C. §287k (1982) (Pub. L. No. 87-731, sec. 5, 76 Stat. 696, approved Oct. 2, 1962).

²⁴ GA Res. 1854 (Dec. 19, 1962).

²⁵ N.Y. Times, June 8, 1963, at 1.

and as the province mainly of the Security Council, was also implicitly acknowledged. Negotiations on the implementation of Article 19 continued into 1965.

The "Goldberg Corollary." In August 1965, at a meeting of the UN Special Committee on Peace-keeping Operations, Ambassador Arthur Goldberg announced that the United States would not demand the application of Article 19 against France, which had reached the Article 19 threshold in 1965, and the Soviet Union. He added, however, that "if any member can insist on making an exception to the principle of collective financial responsibility with respect to certain activities of the organization, the United States reserves the same option to make exceptions if, in our view, strong and compelling reasons exist for doing so." In making this point, however, Ambassador Goldberg stressed that it was still the view of the United States that the Assembly should be applying Article 19 to withholding states, and that the United States "places the responsibility where it properly belongs—on those member states which have flouted the Assembly's will and the Court's opinion."²⁶

The Law on Article 17 after "Goldberg." State practice following the "Goldberg corollary" and the General Assembly's informal agreement seems to indicate that Article 17 retains its legally binding nature, but that the Article 19 penalty might not be applied in respect of withholdings that fall within the ambit of that agreement—and possibly in other situations as well. No new Article 19 situation owing to withholdings (as opposed to late payments) has since arisen. In the view of the United Nations, and probably of most member states, General Assembly resolutions adopted pursuant to Article 17, as well as other resolutions concerning UN internal matters, continue to be fully binding on all members.²⁷

The United States is not the only UN member currently withholding assessed contributions. Some 17 others are doing so, for a variety of reasons and with different justifications.²⁸ In these circumstances, it has been suggested that the Assembly's failure to enforce Article 19 may have impaired

²⁶ UN Doc. A/5916/Add.1 (1965), reprinted in 53 DEP'T ST. BULL. 454-57 (1965).

²⁷ The President of the General Assembly, Jaime de Piniés of Spain, speaking at the resumed 40th session of the Assembly, said: "I wish to re-emphasize that all Members have a contractual obligation under the Charter to pay their duly assessed contributions." UN Doc. A/40/PV.132, at 7 (1986).

As to U.S. policy, in a letter dated Apr. 25, 1975, characterized as a "statement of U.S. policy . . . as to the legal effect of United Nations General Assembly resolutions," Judge Stephen M. Schwebel, then Deputy Legal Adviser of the Department of State, wrote: "General Assembly resolutions passed pursuant to Article 17 of the Charter regarding assessed contributions to the United Nations budget . . . are binding." Dep't of State File No. P75 0075-445, reprinted in 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 85.

²⁸ Estimated cumulative withholdings from the UN assessed budget, not including peace-keeping operations, as at Dec. 31, 1985:

Albania	U.S.\$ 617	Hungary	1,162,900
Bulgaria	706,400	Israel	12,600
Byelorussian SSR	1,837,674	Mongolia	59,000
China	4,277,100	Poland	2,794,800

the legally binding nature of Article 17 with regard to specific withholdings.²⁹ However, the Charter does not state explicitly, and neither logic nor practice (except possibly in the context of "Goldberg") demands, that Article 17 is utterly and solely dependent for its survival on the support given it by the sanction under Article 19. Even if that were the case, any divergence from Article 17 would of necessity have to be limited by very stringent criteria—criteria that, at the very least, would require a sound argument that the activity approved by the Assembly was *ultra vires* or "unlawful."³⁰ Furthermore, such an argument would in some manner have to be proven, for if a state need only assert a claim, the viability of the United Nations as an institution would be called into serious doubt.

The above debate applies only to specific withholdings; in the case of the "across-the-board, unilateral cuts" of the Kassebaum amendment and the Gramm-Rudman-Hollings Act, there seems to be little question that Article 17 is binding and controlling.³¹

In a recent indication of the views of states—allies of the United States—the European Community countries addressed a memorandum to the U.S. administration:

The Twelve wish to express their concern that recently enacted U.S. legislation, in particular the Gramm-Rudman-Hollings act and the Kassebaum amendment, is significantly affecting the Administration's ability to comply with its international treaty obligations. The implementation of such legislation will result in the United States not fully meeting its financial obligation to the United Nations as contained in Article 17, paragraph 2, of the Charter Selective adherence to the principle "*pacta sunt servanda*" erodes the very foundation of the

Czechoslovakia	1,994,400	Romania	781,200
Democratic Kampuchea	70,600	South Africa	24,484,504
France	4,357,157	Ukrainian SSR	5,858,844
German Democratic Republic	3,602,400	United States	6,904,100
		USSR	40,783,134
		Vietnam	13,200

UN Doc. A/C.5/40/16 (1985). The amount of U.S. withholdings will be considerably larger—probably larger than that of the USSR—when the final estimates for 1985 are submitted to the 41st session of the General Assembly.

Some 23 members, including the United States and the USSR, also withhold assessed contributions to peacekeeping accounts; the total amount withheld was estimated at over \$200 million as at Dec. 31, 1985. *Id.* The Soviet Union is responsible for the lion's share of this amount, most of which is owed to troop-contributing countries and therefore does not affect immediate cash flow in the United Nations. On Apr. 18, 1986, in the Security Council, Ambassador Yuri Dubinin said that the USSR "declares its willingness henceforth to take part in the financing of [the UN Interim Force in Lebanon]. Of course, that decision should in no circumstances be regarded as having retroactive effect as recognition of 'indebtedness' on our part for past years." UN Doc. S/PV.2681, at 8–10 (1986).

²⁹ For example: "[T]he norm fell into desuetude." T. FRANCK, *NATION AGAINST NATION* 259 (1985).

³⁰ In addition, "cogent reasons of national self-interest" may be required. *Id.*

³¹ Kassebaum and Gramm-Rudman-Hollings, in Franck's view, do not satisfy the requirement of *ultra vires* and are not "surgical excisions" from the UN budget. Franck, *Unnecessary UN-Bashing Should Stop*, 80 AJIL 336 (1986).

international order. In this respect financial obligations are no different from any other international obligations.³²

In a letter sent in April 1986 to Secretary Shultz, six members of the House Foreign Affairs Committee, including Chairman Dante Fascell, asked the State Department to comment on "the question of our possible treaty obligations in light of the significant arrearages that may accumulate over the next several years given U.S. budget restraints."³³

Supremacy Clause Questions. Since acts of Congress are on full parity with treaties, U.S. courts will construe them, to the extent possible, as compatible with prior treaty obligations; but if they find the two incompatible, the "later in time" rule will operate.³⁴ It has been argued, however, that "the United Nations Charter . . . has a special, almost constitutional character. To an international instrument of this stature, the 'later in time' overruling canon should not apply. . . . [T]he rules derived from the Charter prevail not only over earlier law but also over later statutes."³⁵

Whatever the proper application of the Supremacy Clause of the Constitution may be in domestic law in these cases, under international law it is well settled that no state may rely on its domestic legislation to justify its failure to perform a treaty obligation.³⁶

Politics and the UN Financial Situation. This Note makes no attempt to describe fully the nature or causes of the current fiscal difficulties facing the United Nations. It is appropriate, however, to mention that the debate over the legal aspects of U.S. withholdings is part of a larger, highly political debate. In general terms, one line of argument is that the genuine issue in the present case is the gross fiscal mismanagement and budgetary irresponsibility of the United Nations, and the lack of an alternative course of action by the United States to remedy that situation. In matters of foreign policy and national security, given such circumstances, international legal obligations are either irrelevant or are mere technicalities, and are rightly overshadowed by *realpolitik*.

The opposing line of argument stresses the notion that fulfilling international legal obligations is important to a nation for many reasons—including, often, political and strategic interests—and that the fiscal and budgetary problems in the United Nations are being adequately addressed.

³² Memorandum to Secretary of State Shultz, Mar. 14, 1986, reprinted in 25 ILM 482 (1986).

³³ The other signers were Reps. Dan Mica, Benjamin Gilman, Olympia Snowe, Gerald Solomon and Gus Yatron.

³⁴ "It is settled constitutional doctrine that Congress may nullify, in whole or in part, a treaty commitment." *Diggs v. Shultz*, 470 F.2d 461, 465 (D.C. Cir. 1972). In that case, Congress was explicit: the legislation "was intended to make . . . the United States a certain treaty violator." *Id.* at 466. The same might be said of the Kassebaum amendment on its face and of Gramm-Rudman-Hollings in application, and perhaps of the specific withholdings in view of stated U.S. policy.

³⁵ Sohn, Remarks, 63 ASIL PROC. 180 (1969).

³⁶ "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, Art. 27, May 22, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969). The Vienna Convention is "recognized as the authoritative guide to current treaty law and practice." Message from Department of State to U.S. Senate, S. EXEC. DOC. L, 92d Cong., 1st Sess. 1 (1971).

Those making the former argument claim credit for budget reform in the United Nations; those making the latter criticize the tactic of withholding payments as a means to that end, and lament the resulting damage to both the United Nations and the credibility and reputation of the United States. There are members of Congress, and officials in the Reagan administration, representing both sides of this policy debate.

Postscript

On April 28, 1986, as the General Assembly was resuming its consideration of the financial crisis at the United Nations, Secretary-General Pérez de Cuéllar made some informal comments about the difficulties facing the Organization. He suggested that the five permanent members of the Security Council, "because they have a situation of privilege in this house," are "duty-bound to pay more" than other members, and should each pay "more or less the same amount." Under such a plan, "the United States should reduce its contribution to, I don't know, 20 or even 15 percent and then some other countries should increase their contribution." Explaining this idea, he said that "no single country should be in a position in some way to threaten or to blackmail the United Nations."³⁷

On July 17, 1986, the House of Representatives approved the fiscal 1987 appropriations bill that included funding for international organizations.³⁸ At this writing, the Senate had not considered these appropriations.

The House bill would require two specific withholdings from the U.S. assessed contribution to the UN budget, totaling \$17.57 million: (1) \$10 million, to constitute implementation of the "Sundquist amendment" of 1985; and (2) \$7.57 million, representing that portion of the U.S. assessed contribution designated for the UN Department of Public Information.

The bill would also require two across-the-board reductions, partly designed to meet Gramm-Rudman-Hollings targets, with a potential total of \$10.91 million to be cut from the U.S. contribution to the UN budget: (1) a \$9.93 million reduction in the international organizations and conferences account, of which about \$3.58 million would be applied to the United Nations; and (2) an additional 5.03 percent reduction covering the United Nations and other accounts, which could reduce the U.S. contribution by a further \$7.33 million.

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³⁷ N.Y. Times, Apr. 29, 1986, at A11.

³⁸ H.R. 5161, 99th Cong., 2d Sess., 132 CONG. REC. H4623 (daily ed. July 17, 1986).

* Of the District of Columbia Bar; Chairman, International Organization Group, American Society of International Law. This Note was prepared for a private consultation held at the American Society of International Law on May 29, 1986. It does not imply the taking of a position by the Society. It was designed to provoke discussion. Some clarifying changes have been made and notes added. A public panel session on the same topic was held in Washington on June 12, 1986, and was reported in the *ASIL Newsletter*, May-July 1986, at 1.

U.S. LOYALTY PROGRAM FOR CERTAIN UN EMPLOYEES
DECLARED UNCONSTITUTIONAL

On April 8, 1986, the United States District Court for the Eastern District of Pennsylvania held, in the case of *Hinton v. Devine* (Civ. No. 84-1130), that Executive Order No. 10422 of January 9, 1953, as amended, under which the International Organizations Employees Loyalty Program had been instituted, was unconstitutional in that it violated the First Amendment rights of American citizens. The district court also enjoined the United States Government "from publishing, communicating, or advising any third parties, including any international organizations, as to the loyalty of William H. Hinton or any other United States citizen."

The International Organizations Employees Loyalty Board, created under the executive order of President Eisenhower, had attempted to create a so-called loyalty security program for American citizens employed, or desiring to be employed, by international public organizations such as the United Nations and its specialized agencies. William H. Hinton is a former employee of the Food and Agricultural Organization (FAO). His was the second test case to challenge the constitutionality of the executive order.

The first test case, *Ozonoff v. Berzak* (Civ. No. 71-1046-MC), was brought before the United States District Court for the District of Massachusetts in 1971 on behalf of Dr. David Ozonoff, a former employee of the World Health Organization (WHO). After delaying its decision for over a decade, the court rendered a judgment on September 6, 1983 in favor of Dr. Ozonoff. Thereupon, the United States Government appealed to the United States Court of Appeals for the First Circuit (No. 83-1850). On September 21, 1984, the court of appeals unanimously held that the executive order was unlawful as applied to a WHO applicant and that the executive branch could not require Dr. Ozonoff to submit to a loyalty investigation pursuant to the order. Significantly, the court of appeals addressed itself to the Government's argument that "the Order may affect America's international relations." The court said:

The appellee is a medical doctor. He is not a politician, a diplomat, or even an administrator. He does not want to represent the United States abroad, engage in diplomacy, or practice politics. He seeks to work for an international organization that fights disease. His object—prolonging human life—is technical and scientific, not political. His employer is an international organization, not the American government.

The court of appeals thus affirmed the judgment of the district court. Although this was the first litigation regarding the constitutionality of the International Organizations Employees Loyalty Program, the decision was not appealed by the United States Government to the Supreme Court.

It may be recalled that, pursuant to President Eisenhower's executive order, regulations were promulgated during the "McCarthy era" and in the midst of the Cold War under which many American citizens were discharged from their positions in the United Nations, UNESCO, the FAO and other

international organizations. These discharges were held illegal by administrative tribunals of those organizations. The International Court of Justice rejected attempts to set aside the tribunals' decisions. Nevertheless, the employees were never reinstated and were only awarded back pay.

The dismissals took place against a background of jury proceedings and hearings of the Internal Security Subcommittee of the Senate Judiciary Committee, which pilloried scores of loyal and highly competent, indeed in some cases distinguished, public employees. It is therefore gratifying to note that, after 30 years, two U.S. district courts and one court of appeals found it necessary to declare the executive order unconstitutional. Equally gratifying are the subsequent decisions by the United States Government not to appeal the landmark judgment in the *Hinton* case¹ and to suspend the investigative program under Executive Order No. 10422.²

MARK A. ROY*

¹ Appellant's Motion to Voluntarily Dismiss his Appeal, *Hinton v. Devine*, No. 86-1378 (3d Cir. 1986).

² Letter from Sol Kuttner, Adviser, Resources Management, United States Mission to the United Nations, to Igor Radovic, Director of Recruitment, United Nations Office of Personnel Services, June 2, 1986.

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BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

Essays on International Law and Organization. 2 vols. By Leo Gross. Dobbs Ferry: Transnational Publishers, Inc.; The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1984. Pp. xvi, 1206. Index. \$120.

It is good to have the writings of Leo Gross in a single collection. These two volumes contain virtually his entire oeuvre for the period 1945–1983. Much of the material appeared in this *Journal* and in the *Proceedings* of the annual meetings of the American Society of International Law. Also included are contributions to *Festschriften*, collective works and learned journals. An unexpected but welcome item is a detailed study of digests, compilations and other documentation that evidence international custom. It was prepared by Gross for the UN Secretariat and published in 1949 as a document of the International Law Commission. It is still of value.

The 45 papers in the collection were not edited for their republication. Naturally enough, repetition and overlap can be found. For some reason, the printing errors are more common than one would expect in a reprinting of published material. The publisher has distributed three substituted pages and a short list of errata (which one hopes librarians will include). However, a number of other mistakes are still to be found. Considering that the price is \$120, the publisher might have taken more pains to eliminate them.

In a graceful and laudatory preface, Stephen Schwebel observes that these papers reflect Gross's "singular combination of idealism and realism, his taste for a more effective international law heavily salted with a sense of the limitations imposed by the hard facts of international life" (p. xi). The observation is apt, though perhaps the combination of idealism and realism is not as "singular" as suggested. For Gross follows in this respect his eminent mentors, Hans Kelsen and Josef Kunz, who brought to American international lawyers the analytical approach developed in Vienna prior to the Second World War. Often loosely characterized as positivists, they viewed international law in the light of their ideal of a true legal order—an order in which the rights and obligations of states would be determined in the final analysis on the basis of law applied by objective tribunals untainted by politics. Compulsory jurisdiction of an international tribunal is an essential element of that ideal. Kelsen, Gross observes, would extend such jurisdiction to all disputes since he does not regard the distinction between justiciable and nonjusticiable disputes as tenable. Gross does not follow him quite that far, commenting that not all differences between states are suitable for judicial resolution (p. 394). But insofar as differences are based on claims of right or duty, they are justiciable and in Gross's view a legal order in the proper

sense cannot exist unless states submit their auto-interpretation of legal rights and obligations to objective third party judgment.

This ideal may be said to have a true ideality in that it is unrealizable in the world as we know it. Gross does not expressly acknowledge this but it is clear that his expectations are limited. He does not anticipate that states will see the light just because it is reasonable to do so and, in the Viennese tradition, he is never surprised that governments pursue their self-interest rather than their proclaimed ideals. This does not inhibit his criticism of their "realistic" conduct. Holding fast to his ideal of a lawful world, Gross has no difficulty in showing that governments, international organizations and even courts fall short of that ideal and of their own pretensions to law observance. He does this, not merely by broad generalization, but typically by close analysis of texts, *travaux préparatoires*, precedents and claims. Most of the papers in this collection exhibit this painstaking attention to detail in the exhumation of past cases, debates and legislative histories. The detail may often seem excessive, particularly as the significance of the events discussed is not always made evident. Readers might infer that Gross's main object is to expose the hypocrisy, wordplay and chicanery dominating the role of lawyers in international bodies. This may please those who see that aspect as "realism"; others will miss the grand design and the vision that have motivated many to take international law seriously.

In most cases Gross's criticism does not seem governed by his political views. For example, in the earliest article included, written in 1945, he contends, after a minute examination of the record, that the League of Nations had no legal right to expel the USSR for its attack on Finland (pp. 559-61). Another paper, dealing with the legality of the Nuremberg trials, reviews the legal documentation leading up to the London Charter and concludes that "sound evidence" did not support Robert Jackson's argument that "crimes against peace" were part of customary law. His favorite target is the United Nations, even in its halcyon days. In 1951 he found the decision of the Security Council authorizing military action against North Korea contrary to the Charter. In 1965 he concluded that UN actions in the Belgian Congo were also illegal. He obviously takes relish in exposing the double talk in UN debates and the plastering over of differences in resolutions even while expressing his hopes (as he once did) for a stronger United Nations. The United States is not exempt from his "cynical acid," especially for its earlier attempts to diminish the role of the veto and, even more emphatically, for its ambivalent attitude to the International Court. He is also critical of the stand taken by the United States and the International Court in 1962 in support of legal obligations to pay peacekeeping expenses as determined by the General Assembly. This essay, a good example of Gross's detailed legal analysis, should find favor with the present U.S. administration and with the Soviet Union (though it must be said, in fairness, that Gross does not share their attitudes to the United Nations). As might be expected, Gross has not been persuaded by McDougal's policy approach. Some of his most caustic comments are directed at its theory of interpretation which, in his view, would replace law with subjective preferences (pp. 407-09).

Gross often refers to the necessity of achieving the political conditions that are a prerequisite for progress to a legal order. However, he does not consider it to be his role to examine the causes of tension or the forces that could lead to a diminution of the present attitudes opposing the impartial application of law. He alludes briefly, now and then, to the possibility of hegemonial rule by powerful states or concerts of states and he asserts that such hegemony would diminish the freedom and autonomy of national states much more than the acceptance of a legal order in which collective institutions would create and apply law on a basis of equality (p. 397). Thus, while upholding his ideal he offers us a "realism" that says little more than that governments, like the rest of us, are motivated by self-interest and a very limited perception of common interests.

Despite Gross's limited hopes that states will see the light, these essays include many proposals for improving the legal climate of international institutions. The most recent paper, an editorial comment, supports the exercise of U.S. clout to avoid further "degradation of the constitutional environment" of international bodies (pp. 661-74). Many papers refer to concrete procedural proposals to facilitate attention to law; others aim at improving multilateral negotiation processes. Ideas for enhancing the role of the International Court and improving its functioning are discussed in as many as 15 essays (pp. 677-1078). In some of them, he makes suggestions for specific ways of improving the processes of international lawmaking and enhancing the role of the International Court. His own proposals are generally modest. He looks to the United States and other law-minded states for improvements. With uncharacteristic optimism, he found the Tehran *Hostages* case a hopeful augury. He evinces little hope that the Soviet Union or the Third World will turn to the Court but of course he could not foresee that Nicaragua would become a leading plaintiff, possibly presaging other changes in attitude. Nor did he foresee when he wrote about the Tehran case in 1980 that a U.S. administration would soon thereafter conclude that the Court was inimical to its interests and that it could not expect a fair and impartial determination of its rights by that tribunal. Gross may well find this a further confirmation of his somewhat world-weary realism.

However, the final verdict is not yet in. Most of us dedicated to international law still believe that it is in the enlightened self-interest of the United States to take its legal obligations seriously and to recognize that, unless it does, it cannot expect other states to do so. On that premise, we can find valuable support in Gross's trenchant criticism of auto-interpretation (whether applied to the right of self-defense or any other claims of right) and in his well-reasoned arguments for expanding the role of the Court. Troubled as Gross may be by the rejection of the Court—as who of us is not?—his central thesis is in its essence a counsel of reason. Some may share his intellectual pessimism but, like him, we are all duty bound to keep our shoulders to the wheel.

OSCAR SCHACHTER
Board of Editors

Achieving Effective Arms Control: Recommendations, Background, and Analyses. A Report of the Committee on Arms Control and Security Affairs of The Association of the Bar of the City of New York, Stanley R. Resor, Chairman and Alan F. Neidle, Project Director. New York: The Association of the Bar of the City of New York, 1985. Pp. xii, 180.

This report is an important contribution to the public debate in the United States about arms control policy. Prepared by a committee that includes many former high-level U.S. officials, it provides a comprehensive and well-balanced discussion of the issues and choices that the United States faces with respect to arms control, proposes a broad strategy and offers pragmatic, detailed recommendations.

The report persuasively argues that appropriate arms control measures that could make a fundamental contribution to U.S. and global security can only be gained if the United States pursues long-term and consistent policies. It demonstrates how the arms control accomplishments that have been achieved and the process of negotiating further agreements have been jeopardized by the tendency of U.S. administrations, particularly the Carter and Reagan administrations, to reject the arms control policies of their predecessors. The report calls for presidential leadership to build a consensus around a coherent arms control policy that the United States could launch and pursue for many years.

This policy should aim at a process that would consist of a "series of pragmatic steps, including formal agreements, parallel restraints, and individual national actions" (p. 7). The first step, however, would be a substantial one, the negotiation of a "foundation treaty" of indefinite or long duration that would encompass the initial trade-offs that had been negotiated and would establish the basic relationships between the nuclear forces of the two sides. This treaty would be submitted to the Senate for its advice and consent to ratification. Subsequent agreements negotiated within the framework of the foundation treaty could be executive agreements authorized by affirmative votes of both Houses of Congress.

The key trade-off in the foundation treaty would be an agreement to forgo testing and deployment of strategic defensive systems in return for a substantial reduction in offensive systems. The report contains detailed recommendations about each aspect of this trade-off, as well as about virtually all other arms control issues including intermediate-range nuclear forces, conventional forces in Europe, nonproliferation, chemical weapons and verification and compliance. It develops the concept of operational arms control, which would involve measures broader than those traditionally designed to build confidence as a means of lessening the likelihood of nuclear war. It also makes recommendations with respect to the process of negotiating arms control agreements. The most prominent suggestion here is that for periodic summit meetings.

There are many suggestions in the report that would command consensus and others concerning which there would be broad agreement in the U.S. body politic. Indeed, the Reagan administration seems to have adopted some

of them, for instance the proposal for periodic summits. Since the report deals with general goals and principles, agreement on these goals and principles does not necessarily mean agreement on how to react to specific Soviet proposals or on the tactics for tabling U.S. proposals. Although the report takes the Soviet military build-up and Soviet violations of existing agreements seriously, the Reagan administration and its supporters would probably regard the general tone of the report as not sufficiently firm with respect to the USSR.

In addition, the report is based on the assumption that deterrence is the only possible strategy in a nuclear age. The only possible role that it foresees for strategic defensive systems is to enhance deterrence. Although unwillingness to accept this assumption would not preclude one from accepting many of the recommendations, it would rule out some, including probably the recommendation for the initial trade-off that would be embodied in the foundation treaty.

Whatever one's position on these issues, the report merits reading and serious consideration. It is crammed with information that is vital to understanding the current debate about arms control, and it contains serious and plausible recommendations that should be at the center of the debate concerning U.S. arms control policy.

HAROLD K. JACOBSON
Board of Editors

A Guide to the United States Treaties in Force. Part I. By Igor I. Kavass and Adolf Sprudz. Buffalo: William S. Hein Company, 1983. Pp. x, 418. \$37.50, paper.

A Guide to the United States Treaties in Force. Part II. By Igor I. Kavass and Adolf Sprudz. Buffalo: William S. Hein Company, 1984. Pp. vii, 346.

This *Guide*, divided into two parts, is the culmination of the authors' treaty-indexing services.¹ Part I contains a numerical list of bilateral and multilateral treaties and agreements of the United States, a subject reference index and an appendix.

The bilateral and multilateral treaties and agreements in force on January 1, 1983 are listed in straight numerical order as they appear in each of the publication series of treaties.² There is also a separate listing of the unnumbered treaties and agreements contained in *Treaties in Force* as of January 1, 1983.³ Each item in these lists includes not only the available information as to the file number (TS, EAS or TIAS), the subject category under which the agreement appears in *Treaties in Force*, the significant dates for the treaty

¹ E.g., UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS CUMULATIVE INDEX 1950-1970 (4 vols. 1973).

² TREATY SERIES 1776-1945; EXECUTIVE AGREEMENT SERIES 1929-1945; and TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1944-to date.

³ Compiled by the Treaty Affairs Staff, Office of the Legal Adviser, Department of State.

or agreement, the citation to where the text of the agreement is published, notes as to what agreements amend or are amended by the specific agreement, but also other helpful notes. The citations do not include the *League of Nations Treaty Series* or the *United Nations Treaty Series* numbers for agreements deposited with those organizations.

The subject reference index utilizes the subject categories of *Treaties in Force* and provides a list of all bilateral and multilateral agreements on the subject. Under the subject heading, the bilateral treaties are arranged by country, the multilateral agreements by a short descriptive title.

The appendix is arranged alphabetically by country for bilateral agreements and alphabetically by subject for multilateral agreements. It contains information on the changes that have occurred since the previous edition of *Treaties in Force*.

Part II is arranged so as to facilitate the retrieval of information about multilateral treaties and agreements. It consists of a numerical guide, a chronological index and a directory of countries and international organizations. The numerical guide lists the multilateral treaties and agreements in straight numerical order for each of the publication series of treaties.⁴ Unnumbered treaties and agreements are listed in chronological order at the end of the numerical guide. For each agreement, the file number, subject category, dates of signing and entry into force, citation to where the official text of the agreement is published and notations as to subsequent action, i.e., amending agreements or replacement provisions for particular agreements, are given. The authors have not attempted to list reservations to the agreements. The chronological index lists the multilateral treaties according to the date of signing and includes the file number, subject category used in *Treaties in Force* and an abbreviated title or description of the particular agreement. The directory of countries and international organizations consists of two separate lists, one of countries and the other of international organizations. The multilateral treaties and agreements to which the United States and each country or organization are parties are listed by subject matter.

The *Guide* is not a substitute for *Treaties in Force* but complements it. The two together facilitate access to the treaties and agreements. In view of the delay in publication of *United States Treaties and Other International Agreements* and the lack of a computer in the office of the Assistant Legal Adviser for Treaty Affairs, which prevents the easy expansion of *Treaties in Force*, the *Guide* is a valuable research resource. The authors plan to issue the *Guide* annually.⁵ This reviewer would recommend the *Guide* for libraries and all engaged in treaty research.

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⁴ See note 2 *supra*.

⁵ The 1984 and 1985 editions of the *Guide* have been published.

Bezhtsny i Mezhdunarodnoe Pravo (Refugees and International Law). By V. I. Potapov. Moscow: Mezhdunarodnye Otnosheniia, 1986. Pp. 104. 90 kopecks.

In his monograph, which reviews in some detail the various conventions and national laws governing asylum, the author focuses on what he sees as the politics of the topic. In his view, statesmen mouth humanitarian phrases to explain intervention on behalf of refugees when in fact their interest is political. As the author sees it, protection of refugees is often argued as a screen to conceal intervention in the affairs of other states in violation of Article 2(7) of the UN Charter. In some cases refugees are given shelter only to be organized as an expeditionary force to be sent back to their homeland to overthrow the government. Pages are devoted to examples, primarily from Africa, and notably from the Ethiopian-Somalian conflict over the Ogaden.

Behind these conflicts lurk the imperialist powers and their clients, in the author's view. He finds these powers using refugees to unseat governments or arguing their cause to vilify the socialist states from which many of them emigrate. Consequently, he anticipates no end to refugee problems until a way is found to dampen the politico-social conflicts between competing social systems. He expects nothing fundamental to come from the UN High Commissioner for Refugees or the many philanthropic foundations concerned, for they can be only palliatives. They do not reach to the root of the problem.

Considerable space is devoted to interpretation of the 1951 Convention on the Status of Refugees, and especially to the proper meaning to be given to its provision on "persecution." The author finds "absurd" some positions taken on what measure of "persecution" justifies acceptance or rejection of an applicant for asylum. He thinks it improper to deem sufficient, as some specialists do, any violation of the Universal Declaration of Human Rights, but contends, on the other hand, that the requirements must not be made so narrow that a man's life has to be endangered by deportation to justify his acceptance as a refugee. As might be expected, he thinks the definition of asylum given in Article 38 of the USSR Constitution is just right.

By its terms Article 38 grants asylum to persons "persecuted" for participation in a revolutionary or national liberation movement or for being active on behalf of progressive sociopolitical, scientific or other creative movements. This definition seems to the author to draw a clear line between political emigrants who are to be granted asylum and those to be denied it for hiding from justice on commission of a crime or pursuing some mercenary or personal interest. In his view, the Soviet criminal codes offer such a clear definition of crime that it is easy to permit determination of what is criminal. In contrast, he thinks some state criminal codes in the United States are unclear since they declare the distinction between felonies and misdemeanors to be the severity of the punishment. He seems not to realize that the severity of punishment is related to the danger of the crime and classification on the basis of the penalty is only for convenience, not as a substitute for definition.

As for the status of refugees in international law, the author suggests that

they cannot properly be said to have "status," since the condition is a temporary one like that of prisoners of war and the wounded. He prefers to speak of the "regime" of refugees. He argues that there is no general international customary law on refugees, but that refugee law is established only by treaty. Thus a state has an absolute right to establish through its municipal legislative process the law to govern refugees, and no other state has a right to intervene on their behalf unless treaty provisions so authorize.

Westerners can hardly accept the argument that it is a class struggle between powers in competing sociopolitical camps that creates refugee situations. Too many memories of the partition of India and Pakistan with the resulting streams of refugees linger to relate refugees solely to class warfare, and tribal strife in Africa is far older than contemporary international conflicts between the United States and the USSR. It is true that the Hitler regime caused the exodus of many who were imperiled because of their political affiliation with leftist parties, but far more suffered and tried to flee for other reasons. The author's narrow vision can be explained only by the political thinking of the country in which he writes, in spite of the wide reading he has done in the many sources cited in his footnotes.

JOHN N. HAZARD
Board of Editors

Derechos Humanos en las Américas. Washington: Inter-American Commission on Human Rights, 1984. Pp. x, 363. \$35.

This most interesting publication coincides with important anniversaries within the inter-American system: it has been 25 years since the establishment of the Inter-American Commission on Human Rights (IACHR), 10 years since the adoption of the American Convention on Human Rights (ACHR) and 5 years since the establishment of the Inter-American Court of Human Rights. The volume contains 29 articles (most are written in Spanish) by distinguished jurists, the great majority of whom have played an important part in the development of the inter-American human rights system.

The articles might roughly be classified into three categories. The first category comprises articles dealing with more general human rights topics, which, however, acquire special importance within the inter-American context: e.g., the forced disappearance of people; human rights in internal armed conflicts; social human rights; democracy and human rights (Gros Espiell). Grossman's contribution on the regime of human rights in states of exception ("situaciones de excepción") falls into this category. He illustrates the problem through reference to the practice of the Inter-American Commission on Human Rights and gives guidelines for the interpretation of Article 27 of the Convention, which deals with the suspension of guarantees. The article by Monroy Cabra on the application of the ACHR in the domestic legal order concentrates on the interpretation of Article 2 of the Convention. In accordance with the prevailing opinion, the author does not understand Article 2 as an argument against the self-executing character of the Con-

vention. In his contribution on human rights in internal armed conflicts (in English), Farer focuses on the right to due process. He also discusses what Article 3 common to the Geneva Conventions of 1949 and Protocol II add to the customary and treaty-based human rights law. Fernández de Soto applies the concept of crimes against humanity to the practice of forced disappearance of people; he calls for a convention in this area.

The second category of articles deals with the implementation of human rights by the Inter-American Commission on Human Rights. Several authors explain the special features characterizing certain procedural devices, such as the local remedies rule, when applied in the inter-American system. Cançado Trindade's article (in Portuguese) deserves particular mention here. The author is a specialist in the field of the prior exhaustion of domestic remedies. He comments on the flexible and—towards the individual—rather generous application of the rule by the IACHR. Unlike others, this article dispenses with lengthy historical or general statements on human rights. The precise analysis of the Commission's practice will be useful for many readers. Cançado Trindade's comments on the presumption of ineffectiveness and on the burden of proof with regard to the fulfillment of the local remedies rule are noteworthy too. Another article points to the extensive admission of individual petitions by the IACHR. Contrary to the European system, only petitions by states, but not individual petitions, presuppose that the respective states have ratified the Convention, and, in addition, made a special declaration pursuant to Article 45 of the ACHR. Moreover, there exists a system of *petitio popularis* before the IACHR, whereas only "victims" of human rights violations may present petitions to the European Commission of Human Rights.

Another interesting factor is that the Inter-American Commission applies the American Declaration on the Rights and Duties of Man to member states of the OAS that are not yet parties to the Convention, for the American Declaration is not a binding international treaty *strictu sensu*. However, the declaration has been acquiring some binding effect *sui generis* because of its forming a part of the inter-American system for the protection of human rights. The dual character of the inter-American system, according to whether a state has or has not ratified the ACHR, also appears in García-Amador's article on the competences of the Commission vis-à-vis member states not parties to the Convention. The contribution highlights the phenomenon that the Convention contains provisions applying to states not parties to it. The author assumes that there is a special argument in favor of the validity of these provisions in relation to all member states of the OAS because the Commission is one of the principal organs of this international organization and because the Convention is provided for in the Charter of the OAS, as amended by the Protocol of Buenos Aires of 1967. The situation is still more complicated with regard to Cuba, for the Government of Cuba was excluded from the Organization in 1962. The author agrees with the IACHR upholding its competences vis-à-vis Cuba. The argument is that only the Government, but not the state of Cuba, was excluded from the OAS.

The article by the former President of the IACHR (Sepúlveda) deals with

the procedure for reaching a friendly settlement. The Commission's attempt to conciliate between the Government of Nicaragua and the Miskito Indians in 1983 is a most recent and a very complicated example. The major difficulty consisted in defining the counterpart to the Government of Nicaragua, for the Miskitos lacked adequate representation at that time. Moreover, the armed conflict in Nicaragua affected the ancestral territories of the Miskitos at the border of Honduras. On the basis of its experience in Nicaragua the IACHR reformulated the preconditions and modalities of the friendly settlement procedure in its rules in a detailed manner. Accordingly, the Commission, at any stage of the procedure, may declare its role as organ of conciliation to have terminated under certain circumstances. Méndez's contribution deals with the merits of the Miskitos' case. According to the opinion of the Commission, the evacuation of the Miskitos did not violate the right to freedom of movement and residence (Art. 22) because the conditions for the suspension of Article 22 "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" (Art. 27) were fulfilled. Méndez also comments on the right of self-determination of peoples and on the protection of minorities under international law. He hopes that the friendly settlement process between Nicaragua and the Miskitos might be reactivated.

The article by the Executive Secretary of the Commission (Vargas Carreño) deals with observations *in loco*, which are characteristic for the IACHR. Although the Commission has its seat in Washington, D.C., an essential part of its work is done in the framework of fact-finding missions or observations *in loco* on the territory of the various American states. The IACHR usually visits a certain country upon that country's or its own initiative. The facts found form the basis for a country report describing in detail the human rights situation in that country. Observations *in loco* and country reports are an adequate reaction to situations involving widespread violations of human rights. During the on-site investigations the Commission visits prisons and detention camps and receives individual petitions.

The third category of articles concerns the Inter-American Court of Human Rights. In his contribution on judicial interpretation of the American Human Rights Convention (in English), the President of the Court, Judge Buergenthal, emphasizes the great importance of the Court's advisory jurisdiction. By its opinions the Court has already created a body of human rights law containing principles whose significance extends far beyond the inter-American context. For instance, it laid down that traditional rules of interpretation cannot always be applied to human rights treaties because of the minor weight of the concept of reciprocity in human rights law. In Article 75 of the ACHR the reference to the regime of reservations under Articles 19 and 20 of the Vienna Convention on the Law of Treaties is construed by the Court in an untraditional way. Judge Nieto Navia gives further explanations of the Court's understanding of Article 75 of the ACHR in the sense of a "reservation expressly authorized" pursuant to Article 20(1) of the Vienna Convention on the Law of Treaties. This interpretation is only one of many examples mentioned in Judge Nikken's contribution on pro-



gressive features in the international regime for the protection of human rights. In addition to giving examples concerning the development of material law, he describes how the Inter-American Commission on Human Rights—initially in the absence of a treaty—interpreted its competences in a very dynamic and progressive way. The IACHR thus developed from an organ for the promotion of human rights, as it was originally conceived, into an organ for the protection of human rights.

Moyer and Padilla of the Secretariat of the Commission write (in English) on executions in Guatemala as decreed by the Courts of Special Jurisdiction. These were the subject both of procedures before the Commission and of an advisory opinion by the Court. Moyer and Padilla explain the system for the gradual abolition of the death penalty established by Article 4 of the ACHR. Judge Cisneros Sánchez sets forth the extraordinarily broad advisory jurisdiction of the Inter-American Court, when compared with any other international tribunal. This area has formed the major part of the Court's activity until now. The Court's advisory jurisdiction extends to all human rights dispositions in international treaties applicable in the American states, whether their main subject is human rights or other matters, and whether or not states outside the inter-American system are or might become parties to the treaty. The Inter-American Court is charged with assisting the members and organs of the OAS in fulfilling their human rights obligations.

All the contributions are relatively short (28 contributions in 363 pages). Therefore, the volume cannot provide a comprehensive analysis of the inter-American system for the protection of human rights, but rather points out some of its problems and aspects. The passages dealing with the specific problems of the inter-American system probably deserve more attention than the more general or historical explanations on human rights. But the brevity of these articles in no way reduces their very stimulating effect on the reader; rather, it is an inducement to further study of the subject.

JULIANE KOKOTT

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Das diplomatische Protokoll. Aufgaben, Mittel, Methoden und Arbeitsweise (2d ed.).

By David Dreimann. Leipzig: Koehler & Amelang, 1983. Pp. 196.

The author defines diplomatic protocol (p. 13) as "the totality of norms and rules which determine the external forms of relations between states, of diplomatic intercourse. It is a political instrument of diplomacy and creates a framework within which diplomatic activities are realized." He then makes the following statement:

To diplomatic protocol, which by its nature is universal, there applies the inalienable principle that the same rules of protocol . . . apply to all states, independently of their socioeconomic character and their political, economic, and military strength. This rule results from the democratic principle of international law of equality and equal rights of all states.

Dreimann mentions only three "specifically socialist" points in the realm of diplomatic protocol. First, the protocolar position taken by the General Secretaries, First Secretaries, and members and candidates of the Political Bureaus of "the Marxist-Leninist parties in the socialist states" (p. 18). Second, the use of the term "Comrade" in the German Democratic Republic (and, let us add, in all other Communist states) in correspondence with "personalities from socialist states" (p. 88). Consequently, the title "Excellency" "does not have any meaning in the practice of diplomatic intercourse between socialist countries" (p. 89). Third, one is informed that the cutaway is not used in socialist countries. In capitalist countries, it is added, tails and dinner jackets are still frequently worn, and "for this reason these garments also belong, there, to the basic equipment of diplomats from socialist countries" (p. 139).

These, then, are all the differences. No "new socialist principles" are established. Common sense statements are made such as: "Only big and rich states are economically able to keep their own embassies in all states with which they have diplomatic relations" (p. 34).

Dreimann, like other writers in the field, strongly adheres to all the rules of diplomatic protocol, written or unwritten, with the strictest respect for rank, title, proper dress, etc. His book is somewhere between two other works in this field, republished in 1978 and 1979, respectively: the Western *Diplomatic Ceremonial and Protocol* by J. R. Wood and J. Serres (2d ed.), and the Soviet *Diplomatic Protocol and Diplomatic Service* by F. F. Molochkov (2d ed.). When compared with the first, Dreimann's book, much smaller in size, is more of a diplomatic Emily Post, reproducing, for example, samples of visiting cards (but, e.g., the wearing of decorations is not considered).

He does not sink, though, to the embarrassing level of the Soviet text, which finds it necessary, under the heading "Opinions About Rules of Conduct Most Widespread Abroad" (not in the USSR?), to give such good advice as, "First one should serve the ladies," "Do not talk with your mouth full," "Do not go out with your shoes uncleaned" or "Do not pull your hat over your eyes, and do not tilt it back."

Dreimann is at his best when he discusses the routine, day-to-day situations relating to diplomatic protocol such as diplomatic parties and "flag protocol." He is weaker when he briefly discusses some institutions of diplomatic law. Just one example: while dealing with the *agrément* he mentions that its refusal "does not represent an unfriendly act vis-à-vis the sending state" (p. 36). This allegation is too categorical because under certain circumstances a refusal may be seen as such. To mention a fairly recent case, in 1983, after Kuwait "rejected" a new U.S. ambassador because he had served in Israel, a State Department spokesman said "the rejection means the post of ambassador to Kuwait will be vacant indefinitely." Kuwait apologized, saying it did not wish to harm relations with the United States.¹

A German translation of the 1961 Vienna Convention on Diplomatic Relations appears in an appendix. In sum, a fairly useful short book.

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¹ Cf. Christian Sci. Monitor, Aug. 18, 1983, at 2.

International Crimes: Digest/Index of International Instruments, 1815-1985. Vols. 1 and 2. By M. Cherif Bassiouni. New York, London, Rome: Oceana Publications, Inc., 1986. Vol. 1: pp. lxxvii, 512; vol. 2: pp. xl, 496. \$90/set.

More "index" than "digest," this reference work guides its users to 312 conventions, resolutions and other multilateral instruments on international criminal law. The instruments are arranged and classified according to their relationship to 22 international crimes, both existing and potential, ranging from aggression and war crimes to unlawful use of the mails and theft of national art treasures; a chapter is also devoted to instruments on the creation of an international criminal court. While no reference is made to bilateral agreements, in other respects this is truly a comprehensive index of international instruments. Doubts as to whether a document should be included seem to have always been resolved in favor of inclusion. This breadth of coverage is a major virtue of the work, but it also means that the user is referred to a number of agreements that have only the most tangential relationship to international criminal law such as the 1963 Limited Test Ban Treaty, and the 1968 Nuclear Non-Proliferation Treaty. A major weakness is the work's failure to quote or summarize the pertinent content of the instruments cited. The user is simply told that if he or she looks to a certain article of a particular treaty, something of penal law significance will (or may) be found. This weakness makes the use of the term "digest" in the title somewhat disingenuous. The work will be most useful to the researcher whose goal is completeness, and who wants to ensure that every multilateral instrument since 1815 on, for example, the penal aspects of the slave trade, has been examined. The first volume will also be of interest to students of the theory of international criminal law since it includes an extensive discussion of the author's system for defining and classifying international crimes. This work is recommended for large international law collections, or for those specializing in international criminal law.

BURRUS M. CARNAHAN
Of the Illinois Bar

Les Etats fédéraux dans les relations internationales. Brussels: Editions Bruylant; Editions de l'Université de Bruxelles, 1984. Pp. 594. BF 1.590.

This collective study by the Belgian Society of International Law, published in a series sponsored by the Brussels Institute of Sociology, on the general theme "Federal States in International Relations," promises us, in its jacket blurb, a double perspective—that of constitutional law, and also that of international law. Add to the intellectual mix that the range of inquiry is to extend to 14 federal (or quasi-federal) states in continental Europe (West and East), North America, Africa and Latin America, and the fact that some highly talented and experienced jurists (among them Eric Stein, Ignaz Seidl-Hohenveldern, Luzius Wildhaber, Georges Van Hecke and Jean Salmon) are included as either *rapporteurs* or orators, and one might have reason to expect some far-ranging and provocative general legal conclusions.

However, in spite of some excellently succinct analyses, by the scholars already mentioned, of their own national laws, this rather loose and sprawling volume ends up without any central focus or body of concepts. As an ensemble of diverse authors, it is, like many other, similar collective works, rather weaker than the sum of its invariably useful, different parts.

Part of the problem is that its approach to constitutional law—comparative constitutional law—is locked into the, by now, intellectually rather sterile methodology of the late 1940s and early 1950s, when scholars like Robert Bowie and Carl Friedrich—the veritable Founding Fathers of Comparative Federalism—were assembling repertoires of diverse national constitutional texts and short analyses thereof for the political drafting committees of the then burgeoning European integration movement. In the particular context of those times the Bowie/Friedrich-directed studies were legally innovative and politically influential. To try to repeat them today, however, with their near exclusive focus on the positive law, as written, of abstract constitutional texts, is (in E. M. Forster's words, in another setting) like arranging dead butterflies coldly in glass cases—an essentially mechanical exercise in inter-systemic legal eclecticism. The science of comparative constitutional law has advanced, by now, to the point where legal rules are recognized as relative to basic societal facts, and reflexes, as such, of larger social and economic problems. Comparative constitutional law studies today become, of necessity, exercises in the comparative sociology of law.

For these purposes, the difficult, plural-national or plural-lingual ("con-sociational") societies like Belgium or Canada may really have something to offer each other by way of their own trial-and-error experience of trying to resolve, by abstract, a priori legal rules, major political conflicts of an ethno-cultural nature that happen to carry over or obtrude into the foreign policy arena. It is difficult, however, to see the general relevance, in a transnational context, of the complex internal constitutional arrangements of essentially homogeneous societies—Australia, as just such an example—unless it be by way of a purely political caveat emptor to potential diplomatic negotiators from other countries.

It is of interest to note that the Vienna Convention on the Law of Treaties of 1969 had, in the final draft articles adopted 3 years earlier by the International Law Commission, included a special subclause (Article 5(2)) as to federal states: "States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down." As a result of determined lobbying (by Canada, among others), this subsection was deleted by a vote of the UN General Assembly in plenary session (66 votes to 28, with 13 abstentions), leaving the article concerned (now renumbered as Article 6) to read, simply, in the final Convention text: "Every State possesses capacity to conclude treaties."

EDWARD MCWHINNEY
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Prawo międzynarodowe publiczne. By Remigiusz Bierzanek and Janusz Symonides. Warsaw: Państwowe Wydawnictwo Naukowe, 1985. Pp. 439. Zł. 300.

This work, coauthored by two eminent Polish scholars, is a well-written textbook on public international law. It is addressed primarily to law students, who take international law as a mandatory course in all law schools in Poland. The course has a long tradition there, *jus naturale et gentium* having been introduced at the Jagiellonian University in Kraków in the beginning of the 18th century.¹

Both authors are accomplished scholars and experienced teachers, and both have firsthand knowledge of international practice and diplomacy. Yet, they come from different academic generations. Professor Bierzanek studied law in prewar Poland, when the Polish doctrine of law was a part of the Western tradition. Professor Symonides, Director of the Polish Institute for Foreign Affairs, was educated when the Marxist philosophy, in its Soviet interpretation, was the dominant intellectual framework. Their thoughts, however, blend quite well, and in spite of their different perspectives the textbook presents a coherent vision of the system of the law of nations.

Chapter I, written by Symonides, introduces the basic notions and concepts of international law. The focus of the discussion is on the idea of peaceful coexistence, recognized by the author as the central element of the relations of the capitalist, socialist and Third World countries. The universality of international law is also highlighted. "In the contemporary world there exists just one system of international law which imposes obligations on, and creates rights for, all states regardless of their socioeconomic and political systems," stresses the author (p. 14). He challenges, in particular, the view expressed by some Soviet authors, according to whom relations between socialist states are governed by a separate body of rules, the "international law of socialist states." Symonides contends that there exist, at best, moral and political principles deriving from the proletarian internationalism and some distinct political and legal principles *in statu nascendi*, which, however, he does not identify; otherwise, "socialist states are bound to apply in their relations the principles of the universal international law" (pp. 13-14). Consonant with that tone, Symonides questions the wisdom of assigning a class character to international law, in the manner of many Soviet and some Eastern European writers. He explains his point as follows:

Since international rules result from cooperation and rivalry, quite often they express a compromise. Furthermore, in international relations one uses such notions as good, interest, or common heritage of mankind, and also that of international community, all presupposing the existence of some general values common to humankind and transcending the class stratification [p. 21].

Symonides underlines that it was the "family of Christian nations" of medieval Europe that laid down the foundation of the contemporary inter-

¹ See M. LACHS, *THE TEACHER IN INTERNATIONAL LAW* 139 (1982).

national community—a theme elaborated in more detail by Bierzanek in a superb chapter on the history of international law and its teaching. Bierzanek, who translated the works of Grotius into Polish, not only knows the history but is able to present it in a fascinating way. A substantial part of the chapter is devoted to the development of the science of international law in Poland, making Polish students aware of the deep-rooted affinities of Polish politico-legal thought to Christian and Western culture.

Bierzanek also wrote chapter III on sources of international law, in which the law of treaties is included, and the last three chapters of the textbook, covering international organizations, the settlement of disputes and the law of armed conflicts. Although throughout the book little attention is given to the World Court's decisions, Bierzanek emphasizes the importance of international adjudication; he believes there is some hope that states will increase their use of international courts (p. 367).

Symonides wrote the chapters on subjects of international law (where he deals with the responsibility of states) and on organs of states in international relations. Furthermore, he covers problems of territory (the law of the sea in its 1982 version is discussed under this heading) and of people in international law (the major portion of the chapter relates to human rights).

The textbook, following the style of most European publications of this kind, oscillates between an American nutshell and a hornbook. There are very few footnotes. A rather basic bibliography is provided, but, unfortunately, there is no index. The format of the book required difficult choices with regard to the topics and issues discussed. The selection is generally judicious. Still, one may wonder why the section on the term "public international law" is as lengthy as the section on intervention and almost twice as long as the one on the enforcement of treaties in Poland. The striking omissions concern legal issues of the economic relations of states. Problems associated with underdevelopment and with the quest for a new international economic order, and those surrounding nationalization and expropriation, are totally disregarded.

There are few examples of the actual practice of states and, among those given, the events of the distant past seem to prevail. Overall, the text is thorough, scholarly and balanced. When used with the appropriate documentary supplement, it will provide students with a sound introduction to the fundamentals of international law.

MARIA FRANKOWSKA
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Practice and Methods of International Law. By Shabtai Rosenne. London, Rome, New York: Oceana Publications, Inc., 1984. Pp. xi, 169. \$30.

This very useful volume declares itself to be "a *Where-to-find-your-law-and-how-to-read-it* book, devoted to methodological, documentation and bibliographical problems of public international law" (p. ix). But this is only part of the story. Shabtai Rosenne's accomplishment has been to integrate

the promised research-oriented treatment into an informed discussion of the "sources" of international law.

His book is unique because of this integration. A more thorough research aid has been provided by John Williams in his *Research Tips on International Law*.¹ There are many works that offer a more detailed analysis of the sources of international law, most notably, Max Sørensen's book² and the Max Planck Institute's *Encyclopedia*.³ Rosenne's briefer treatment of both topics is, however, very able, particularly in the way that he weaves the two together.

The book begins with "Some Fundamentals" and moves on to chapters on "Treaties: Conventional International Law," "Customary International Law," "Judicial Decisions," "Resolutions of International Organizations" and "The Teachings of Publicists." A treatiselike description of the sources of international law runs through all the chapters of the book and constitutes the basis of the enterprise. Anyone new to international law will find this an excellent introduction to the types and nature of international legal rules. Anyone already experienced in the discipline will enjoy Rosenne's illuminating discussion into which is folded a wealth of personal experience.

Upon this doctrinal foundation, Rosenne sets a wide selection of discrete and concrete aids and references to and observations about the evidences of international law. A cover-to-cover reading of the book would be helpful as an introduction to international legal research. On the shelf, the book becomes a valuable reference ready to help in addressing specific research problems in international law.

The work is restricted to sources of public international law and sometimes advises rather broadly with respect to forms of citation. There is still room in the literature for a book that would deal more generally with the many sources of law that are useful in international transactions and for a volume (comparable to that available for U.S. domestic law⁴) that would standardize references to international materials.

MARK WESTON JANIS
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Law & Force in American Foreign Policy. By Edwin C. Hoyt. Lanham, New York and London: University Press of America, 1985. Pp. 270. Index. \$27.50, cloth; \$12.75, paper.

From time immemorial states have used force to shape the policies of other states, to defend themselves and others from aggression, and to gain material possessions and influence. In recent years, the democratic states in particular have sought to establish global order under shared perceptions about international law, and with it the legal control over the use of force.

¹ Williams, *Research Tips on International Law*, 15 J. INT'L L. & ECON. 1 (1981).

² MANUAL OF PUBLIC INTERNATIONAL LAW (M. Sørensen ed. 1968).

³ ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, especially instalment 7 (R. Bernhardt ed. 1984).

⁴ HARVARD LAW REVIEW ASSOCIATION, A UNIFORM SYSTEM OF CITATION (13th ed. 1981).

Notably, they have designed for this purpose the League of Nations and the United Nations.

In this book, Edwin C. Hoyt traces law and force in American foreign policy, commencing his appraisal with the activities following the Second World War. While he acknowledges that other policies—economic policy in particular—and factors such as the “general free enterprise ideology” have affected the perspectives of the decision makers, his text focuses only on the “policy relevance of international law.”

He employs the case format to present the instances in which force has been used. Three brief introductory chapters set forth the “principles of world order.” Hoyt describes the initial belief that world organization might be our overall foreign policy objective, and might best be realized by establishing a network of norms (found in the Charter) to control the use of force in the future relations among states. He refers to three principles: legal limits on the use of force, the principle of noninterference, and neutrality—a changing principle that is, however, always aimed at restraining support of warring factions.

The book is short but provides ample exposition of Hoyt's own views. The Berlin crisis, he suggests, revealed the constraints within which any decision to support Berlin had to be implemented. Eisenhower was troubled, as Presidents are today, by the absence of rational options, or by the limits imposed upon any action that might be taken to project the will of the United States in its external relations:

Inevitably [Eisenhower noted in his memoirs], despite intimate acquaintance with it, the question kept coming back to me: “How, or rather why did the Free World get into this mess? How did we ever accept a situation in which our only feasible response to an attack on a thirteen-thousand-man garrison surrounded by numerous Communist divisions would likely mean the initiation of World War III [p. 34]?”

Examples of other crises are explored in detail. They range from the Berlin matter to Nicaragua, and have led to the author's support for a decision on the use of force by the World Court. Hoyt insists throughout his book that much of the activity of the United States in using force has been in response to a fear of communism. He believes that UN principles—and the law of the Charter, as he perceives that law—should guide if not control U.S. policy and decisions where the use of force is contemplated.

Through adherence to UN principles and to related law, the United States will not run the risk of wars that are not “justified by any American interests.” This in turn would seemingly lead to an agreement among states—particularly the United States and the Soviet Union—to avoid the dangerous game of “chicken” in which each continuously probes the other's weakness and exploits advantages. Hoyt observes: “Where the United States has departed from its commitment to the UN principles, it was a consequence of an obsessive fear of communism, which led the decision-makers to reject all restraints on their choice of means to fight it” (p. 228).

As Hoyt indicates, the legal controls over the use of force call for global order controls. It is evident then that the use of impermissible violence—

impermissible by community standards—is an attack on the global order itself. Only through the imposition of law embodying community expectations can law have control over aggression: law after all is the product of decisions made by the community, and it must be applied to the decisions that members make individually. But while pursuing Hoyt's call for increased legal controls, we perceive states that have gradually split off into contending groupings of like-minded states, with their own perspectives about law, and competing for power and influence in a global war system.¹

Because military capability has the deciding weight in the current power-balancing process, there is a competitive pursuit among states of modern technologies that can deliver highly destructive discriminating force against the targets selected. This is a thrust toward naked power—a quest first for influence, for territory, that can go on to become a bid to take over the global decision process itself, including its law.

Law in all of this requires that states, through reciprocities in and checks upon their behavior, establish those patterns of conduct that reflect the application of controls or restraints effectively imposed. Arms control efforts seek indirectly to restrain the use of force by coupling law and weapons balancing as part of the larger decision process, but they can, at best, only achieve agreements on paper. The test of their effectiveness is in compliance. Decisions of the treaty partners that transcend such agreements cannot be tied down except by the power-balancing process in which military capabilities remain decisive.

Controls through norms, as Hoyt suggests, such as those relating to aggression (i.e., the *jus ad bellum*) are at best attempts to control future decisions to resort to the use of force. But here too the matter relates to power balancing. Perhaps conditions may be developed within the global community so that a decision by any state to resort to force will face a large network of risks to that state's influence if it does so. Such a development would reduce its incentives to use force, or compel it to face possible impairment of its economic or social well being, or even assume the increased, and long-term, economic and political costs to sustain the influence achieved (cf. the Soviet costs in achieving influence over Cuba).

If states are as closely concerned about the global order and its law as their jurists and statesmen insist they must be, the pressures from the community as a whole must more emphatically reject the aggression arising in various guises throughout the world. States must more swiftly adopt collective or parallel measures to reflect that rejection. But they appear instead to be competing over the global order itself, or are caught up in the gradually growing tolerances for violence and in a malaise with respect to opposing it or invoking and strengthening standards that outlaw it.

States continue to manifest their competition in opposing claims about the "legitimacy" and "illegitimacy" of each incident in which force is used.

¹ For a perspective on the global war system and power balancing, see McDougal, Reisman & Willard, *The World Process of Effective Power: The Global War System*, in *POWER AND POLICY IN QUEST OF LAW* 353 (1985).

United Nations principles and law under these conditions remain a notable goal. But the realities of global insecurity compel us to be cautious in predicting the degree to which policy will in fact be subject to such law, and how the establishment of shared institutions can proceed among adversaries who struggle with each other over the global order itself.

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The Making of International Agreements: Congress Confronts the Executive. By Loch K. Johnson. New York and London: New York University Press, 1984. Pp. xx, 206. Index. \$30. Distributed by Columbia University Press.

This fine book explores the content of international agreements made by the United States, describes the process by which those agreements are made, analyzes the shortcomings of that process and recommends improvements.

The book begins with a comparative review of the form and content of public international agreements—treaties, statutorily authorized agreements and executive agreements—entered into by the United States between 1946 and 1972. This apparently is the first time a study of this sort has been conducted. Yet the freshly mined data yield few surprises. Use of the “sole” executive agreement has accelerated. The major instrument is still the statutory agreement, but Congress shows little interest in the substantive details of those agreements—perhaps because most agreements are with democratic nations. Ties with autocratic nations are not rare, however; those agreements have consistently involved dictatorships of the right rather than the left.

The rise of the executive agreement is comprehensively detailed, followed by a full account of the Bricker “revolt,” enactment of the Case Act (requiring the reporting of executive agreements) and the failure of congressional efforts to put into place a procedure for the approval or disapproval of executive agreements. The legislative-executive wars fought over executive agreements during the 1970s, involving the Morgan-Zablocki bill (which would have subjected certain executive agreements to a legislative veto) and Senator Dick Clark’s “Treaty Powers Resolution” (which would have subjected their funding to a point-of-order procedure), are carefully and accurately related. Also described is the consultative procedure (of Senate Resolution 536) that resulted from Senator Clark’s effort.

Professor Johnson is not coy in stating his thesis: foreign policy should be conducted on the basis of a partnership between the executive and legislative branches. His recommendations to effectuate that objective carry the seasoned judgment of the Hill policy analyst he once was (as foreign policy adviser to Senator Frank Church and later as a staff member of the House Foreign Affairs Committee). These include suggestions concerning the computerized oversight of executive agreements, regular sample audits on

"agreement-reporting fidelity" and a full legislative review of the agreement-making process.

The author acknowledges that the "jury is still out on the question of how intently the Congress really wants the foreign policy partnership its members occasionally promote" (p. 174). The reason, he might have added, is that Congress—shortsightedly—invariably seems more concerned about the *substance* of a given policy than it does about the *procedure* by which that policy is formulated. It too often forgets, as the late Judge Harold Leventhal reminded us, that "procedure is the first outpost of the law." Congress was, for example, gravely concerned about the substance of the U.S.-Philippines bases agreement—at least, when the agreement was on the verge of being undone earlier this year. Had Congress in the late 1970s been equally concerned about the *procedure* by which that agreement was entered into—as a "sole" executive agreement—it might then have had occasion to focus on the agreement's substantive content and ramifications—before the whole subject was, as they say on the Hill, "overtaken by events."

As Johnson says, it is, in the end, entirely a matter of congressional will. Except for a few isolated expressions of concern, Congress once more has pretty much become the President's lap dog. This book will not likely need updating for some time.

MICHAEL J. GLENNON
Board of Editors

The United Nations Organization. By Alkis-B. N. Papacostas. Athens, 1985. Pp. 176. In Greek.

The author gives his position as "professor of international law" but omits to mention the institution with which he is affiliated; this, I am informed, is the Panteios School of Political Science, an institution of university status in Athens.

The book consists of a preface, an introduction, a main part dealing with the functions of the organs of the United Nations Organization (UNO) and an appendix that includes the Charter of the United Nations and the Statute of the International Court of Justice. The introduction covers 15 pages, the main part 77 and the appendix 70.

The preface raises high expectations in the reader. In it, the author acknowledges the international crises, cold wars and local wars that have taken place during the 40 years of the UNO's existence. He mentions attempts to reform the UNO by transferring powers from the Security Council to the General Assembly. He predicts that the UNO will survive in order to provide a meeting place for those in charge of the maintenance of international peace and security and a forum to which "all the unjustly treated" can bring their grievances even if there is only a slender hope for a satisfactory solution. It is not clear whether the author refers only to states with grievances or whether he also has in mind the unsatisfactory handling by the UNO of individual petitions concerning human rights violations. The author con-

cludes by observing that the importance of the UNO to the preservation of peace and therefore life on this planet justifies one more study of the UNO's functions and its ability to meet its objectives.

The momentum is maintained in the introduction. Here the author compares the historical contexts in which the League of Nations and the UNO were created. The League of Nations aimed at the maintenance of the status quo, brought about by the Treaty of Versailles, whereas the UNO aims at "revolutionary" changes. The League of Nations had no United States, and only limited Soviet participation, whereas the UNO has the participation of both superpowers. Brief reference is made to the declarations and conferences that led to the establishment of the UNO and a good, though commonplace, comparison between the structure and decision-making processes of the League of Nations and the UNO is provided.

In contrast, the main part of the book is disappointing. It describes accurately but superficially the functions of the General Assembly, the Security Council, the International Court of Justice and the Secretariat. The discussion on the norm-creating effect of General Assembly resolutions is well balanced, though there is an absence of any Third World perspective. The discussion would have been enhanced by specific reference to General Assembly resolutions as illustrations of the extent to which, if at all, they can affect the development of international law.

Most of the books cited by the author were published in the 1950s and 1960s. Obviously, a great deal has happened and has been published since Hans Kelsen's works, Tunkin's *Droit International Public* (1965) and *Theory of International Law* (1974), and Goodspeed's *The Nature and Function of International Organization* (1967). According to the unfortunate practice generally prevailing in England and in continental Europe, there is not a single reference to current articles in leading journals of international law.

Following the traditional European approach, the author is content to describe the basic procedure of the UNO and the International Court of Justice without reference to political realities. In one instance, when dealing with the "Uniting for Peace" Resolution of November 3, 1950, of the General Assembly, the author commendably traces its origin and assesses its impact. It is a pity that the book did not expand on the interplay of events and procedure. The author had a great opportunity to examine the extent to which the procedure in the General Assembly and the Security Council provides a balance between the numerical domination of the Third World and the conflicting objectives of the free enterprise democracies and of the Communist states. What are the benefits and what are the costs, in political and monetary terms, of the UNO? To what extent has the procedure of the International Court of Justice been improved and how can it be further improved to provide expeditious, impartial and effective relief? Is the International Court of Justice politicized or does it consist of professionals abstracted from petty politics?

In fairness to the author, the reviewer infers that the book is intended to be used by students as a summary of the basic procedure of the UNO organs, including the International Court of Justice. If this is the case, it should have

been made clear in the preface. Even so, the reviewer cannot help thinking that students deserve a more complete and updated commentary and bibliography. What is the good of giving them a lifeless skeleton of rules?

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The International Monetary Fund, 1972-1978: Cooperation on Trial. 3 vols. By Margaret Garritsen de Vries. Vols. I and II: *Narrative and Analysis*; vol. III: *Documents*. Washington: International Monetary Fund, 1985. Pp. 1809. \$60/set.

The activities of the International Monetary Fund probably have more direct impact on daily life than the activities of any other international organization. The Fund is mentioned almost daily in the financial press and frequently in the popular press. Of all international organizations, it is probably second only to the United Nations in terms of public visibility. Yet, important operations and deliberations of the Fund are confidential. The Fund-published histories, which bring to light information not otherwise available, are indispensable to anyone interested in its work.

The International Monetary Fund, 1972-1978: Cooperation on Trial is the third of the Fund histories.¹ It covers the period of the final collapse of the par value system of exchange rates embodied in the Fund's original Articles of Agreement, the efforts of Fund officials and national authorities to cope with the worldwide economic dislocations caused by dramatic increases in petroleum prices and inflation, the increasing needs of developing countries for new and larger sources of finance, the negotiations that led to the Second Amendment of the Fund's Articles of Agreement, which became effective April 1, 1978, and early decisions implementing the amended Articles. The work, written and edited by Margaret Garritsen de Vries, the Fund's official historian, consists of two volumes of commentary and one of documents.

This latest history is destined to be widely reviewed in economic journals.² But this work is not just for economists. The persons most likely to benefit from this major contribution are the readers of this *Journal*—persons who are interested in the development and application of international law and the dynamics of international organizations. Mrs. de Vries writes in a style that almost puts the reader at the table overhearing confidential discussions of the Executive Board. While the greatest attention is given in this history, as in previous ones, to the activities of the managing director and deliberations of the Executive Board, this work, compared to previous histories, gives more attention to the role of the staff and the participation of staff members in the development of policy. Anyone interested in the roles of secretariats in international organizations must study this work.

As important as this history is for the information that it contains, it is even more important for the intellectual stimulation that is bound to follow

¹ The two earlier histories are J. HORSEFIELD & M. DE VRIES, *THE INTERNATIONAL MONETARY FUND, 1945-1965: TWENTY YEARS OF INTERNATIONAL MONETARY COOPERATION* (3 vols. 1969); and M. DE VRIES, *THE INTERNATIONAL MONETARY FUND, 1966-1971: THE SYSTEM UNDER STRESS* (2 vols. 1976).

² See, e.g., Solomon, *The IMF in a Period of Turbulence*, *FIN. & DEV.*, Mar. 1986, at 41.

its unhurried reading. During the period covered by this history, the Fund faced changes in exchange-rate practices by major countries that were not contemplated by its charter. Member countries acted in violation of rules embodied in the Articles of Agreement that had been thought to be basic, and felt justified in doing so. How can an international organization in such a situation maintain respect for law and continue to assert its own jurisdiction? Can obligations be separated into those that are primary and those that are secondary? Should the organization pretend that provisions that are being disregarded are still effective, should it explicitly recognize their lack of effectiveness, or should some middle course be chosen? How can respect for the organization's charter be maintained in the face of violations and while negotiations proceed on amendments to it?

The history provides a fascinating chronicle of the negotiations that led to the Second Amendment of the Fund's Articles of Agreement. They took place over more than 4 years and dealt with issues at the very heart of the organization, including the nature of its regulatory regimes, the degree of national support required for various actions and the flexibility the Fund would enjoy in its financial operations. Few organizations have ever attempted comprehensive amendments of their charters. The problems, the process and the outcome deserve further study. This history, together with other books and articles, provides an informational base on which future studies can build.

De Vries provides insight into policy decisions of the Fund relating to its confidential consultations with member countries. Probably the most important development in international monetary affairs during the 1972–1978 period was the increased importance placed on multilateral consultations on national economic policies. De Vries explains the early development of consultation policies and practices under the Second Amendment. She also discusses the Fund's conditionality policies on the use of its financial resources. She discusses the contexts in which financial assistance was provided by the Fund to Italy, the United Kingdom and the United States, as well as to developing countries.

In addition to the narrative, which provides new information, clarification of issues and events, and an analysis that places events and policies in context, the work under review includes a volume of documents. Many of the documents were published previously, but it is convenient to have them together, particularly since many are otherwise available only in a small number of libraries. Several important documents, previously confidential, are published for the first time. Especially notable are several documents that figured prominently in discussions as the Second Amendment to the Articles of Agreement was being negotiated. These include a staff draft of a new Article IV on exchange-rate policies, a French draft of that article discussed in the spring of 1975 and the U.S. suggestion of an alternative approach that, in large part, later prevailed (vol. 3, pp. 287–300).³ The documents volume

³ Excerpts from later drafts appear in vol. 2, at 754–55, and in Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AJIL 443, 452–55 (1983), reprinted in 2 J. GOLD, *LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS* [hereinafter *SELECTED ESSAYS*] 515, 527–30 (1984).

also includes the texts of a proposed article, not adopted but much discussed, that would have established procedures for substituting special drawing rights or another Fund-created asset in exchange for gold in an effort to reduce the position of gold in national monetary reserves (vol. 3, pp. 305-16).⁴

De Vries has earned the confidence of her colleagues and is somewhat more critical in her analysis in this history compared to the previous ones. While the narrative account represents the personal views of the author and is not officially approved by any Fund organ, the fact that de Vries is a member of the staff and the history is published by the Fund inevitably places some limitations on her ability to criticize. One factor working in her favor is that, with the passage of time, issues that were hard fought often become less personally sensitive and can be discussed dispassionately. The reader will be impressed by the accuracy and the concern for context throughout the narrative discussions.⁵

Every college or university that offers a course in international economics, international organization or international law must make this work available in its library to students and faculty. Teachers of international law and international organization, even those who rarely tread into the economic area, will benefit from this work. There will be a tendency, because of the sheer weight of this work of two volumes of narrative and analysis plus a volume of documents, to use it as a reference work. While it clearly can be used as a reference work, readers will gain the most if they take the time to read the two narrative volumes. They are of enduring value. The reading will be rewarding.

RICHARD W. EDWARDS, JR.
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The Regulation of International Banking. By Richard Dale. Cambridge: Woodhead-Faulkner; Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1986. Pp. viii, 208. Index. \$29.95.

Imagine an international scenario in which nations can promote certain domestic industries by enacting laws that have an equal but opposite effect on the same industries in other countries. Such a scenario may immediately call to mind the subject of international trade; international efforts to coordinate national trade regulations are longstanding and the subject of daily news reports. The average citizen is probably less familiar with the above-described scenario in the context of international banking, the subject of Richard Dale's book. Yet, the risks to the average citizen and to national economies in general are at least as great.

⁴ See generally Gold, *Substitution in the International Monetary System*, 12 CASE W. RES. J. INT'L L. 265 (1980), reprinted in 2 J. GOLD, *SELECTED ESSAYS* 308 (1984); and R. EDWARDS, *INTERNATIONAL MONETARY COLLABORATION* 638-42 (1985).

⁵ If I might be permitted a personal word, Mrs. de Vries's earlier writings were extremely helpful to me when I was researching my book, *International Monetary Collaboration*. The earlier Fund histories are cited throughout the book. Mrs. de Vries was also helpful to me personally. I know that I will be making frequent references to this latest Fund history in any supplement that I may write.

Without an international legal system, nations tend, in the area of trade, to erect high tariffs and nontariff barriers. In the area of banking, nations tend to enact *less* restrictive legislation to attract foreign banks and the business that banks can more successfully generate in a permissive legal environment.

Whereas in the 1940s the General Agreement on Tariffs and Trade (GATT) was established to prevent and settle "trade wars," little has been accomplished by comparison to control the "competition in laxity"¹ in international banking circles. The competition creates a "differential of regulation" among countries, making it virtually impossible for a country to protect itself adequately from the risks of international banking.² In chapters 5 and 6, Dale presents a country-by-country³ comparative survey of national "preventive" and "protective"⁴ regulations, demonstrating their lack of uniformity.

Aggravating this situation of inadequate harmonization of national regulation is the vast increase in international lending since World War II, due to "the rapid growth of international trade and capital flows, the growing tendency for domestic banks to conduct their international operations from offices established in other countries . . . and the spectacular expansion of the Eurocurrency markets" (p. 2).⁵ As the volume of international lending has increased, so have the related risks.

In chapter 3, Dale describes the risks of domestic banking, which are well-known to us from the experience of the depression of the 1930s. Generally, in each country, there are two levels of potential victims: the depositors and their national economy as a whole. Through the international banking activities of a parent institution, depositors are exposed, without their knowledge, to additional risks, which are assumed by the parent's branches and subsidiaries in far-off countries. Dale identifies "country risk" as a particularly significant area of additional risk peculiar to international banking (especially in the Euromarkets). This is the risk that a bank takes when it lends (invests) too large a percentage of its assets in any one country⁶—the situation illustrated by the current "debt crisis" that has resulted from many foreseeable factors that have combined to create a threat of default by Third World debtors worldwide. Creditor banks continue to toss good money after bad in a snowballing series of reschedulings and refinancings meant to keep at

¹ As described by Arthur F. Burns, former Chairman of the U.S. Federal Reserve Board. See p. 181.

² Furthermore, Dale states: "[T]he explosive growth of multinational banking is tending to out-distance the individual capabilities of national regulatory authorities" (p. 175).

³ The country studies cover Belgium, Canada, France, Hong Kong, Italy, Japan, Luxembourg, the Netherlands, Singapore, Switzerland, the United Kingdom, the United States and West Germany.

⁴ "[P]reventive regulation [is] designed to curb risk-taking by banks and thereby reduce the likelihood of liquidity and solvency problems; and *protective* regulation [is] designed to provide support to both banks and their depositors should problems in fact arise" (p. 55).

⁵ Eurocurrency markets are "markets in currencies deposited outside their country of issue" (p. 2).

⁶ "[I]t is paradoxical that investors should be prepared to lend indirectly via the international banking system to countries they would not consider lending to directly" (p. 11).

least interest payments alive. As Dale points out, "long-term lending is unsafe because . . . the borrower's financial condition can deteriorate rapidly during the term of the loan. On the other hand, short-term lending is unsafe because it can lead to a sudden credit contraction" (p. 86).

In chapter 2, Dale presents a comparative survey of unilateral attempts by countries to regulate their banks' activities in the Euromarkets where a great deal of international lending takes place.⁷ Among other strategies to prevent another debt crisis from developing, he proposes a ceiling on the total indebtedness that any one country can be allowed. Also, he calls for an improvement in information exchange among financial-center countries.⁸

One may be tempted to read first Dale's last chapter on "International Supervisory Co-operation." It contains a short history of international co-operative attempts to supervise and regulate banking activities, the most recent being the revised version of the Basle Concordat,⁹ which is based on the general principle of "consolidated supervision," meaning the sharing of responsibilities by the "host" and "parent" countries. Consolidated supervision should, in theory, "reverse the tendency for banks to gravitate to the least regulated jurisdictions" (p. 176) by requiring the application of the more strict of related host and parent regulations.

Nonetheless, we are far from the needed harmonization of national regulation and, as Dale points out, there are weaknesses in the current system. Consolidated supervision does not eliminate differentials of regulation, so business still gravitates toward the least regulated of host-parent consolidations of supervision. Also, bank secrecy in some jurisdictions remains an obstacle to information exchange, and there are several forms of preventive and protective regulation not addressed by the Basle Concordat.

In chapter 7, Dale presents some of the proposals for reform. Addressing the outlook for eventual harmonization of national banking regulations, he states: "Clearly, one of the major problems of harmonisation would be to secure the participation of all countries having financial centre status . . ." (p. 183).

In this book, which he undertook as a Rockefeller Foundation International Relations Fellow at the Brookings Institution in Washington, D.C., Dale presents a readable reference and analytical work. He clearly explains each concept, carefully defines each term and frequently reminds the reader where he has been and where he is heading in the book. Bankers, lawyers, academicians, accountants and policymakers in the field will find this book to be valuable.

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⁷ In addition to the countries listed in note 3 *supra*, Dale briefly describes the degrees of regulation in Australia, the Philippines, Taiwan, Bahrain and the Caribbean offshore centers of Panama, the Bahamas and the Caymans.

⁸ "There is an information gap that needs to be closed through the provision of more comprehensive and timely data on country indebtedness than currently exist" (p. 86).

⁹ Reprinted in appendix I, at 188-94.

Supervisory Mechanisms in International Economic Organisations: In the Perspective of a Restructuring of the International Economic Order. P. van Dijk, General Editor, and G. J. H. van Hoof and K. de Vey Mestdagh, Assistant Editors. Deventer: Kluwer Law and Taxation Publishers; The Hague: T. M. C. Asser Instituut, 1984. Pp. xxii, 808. Dfl.350; \$140.

The editors have undertaken three important tasks. First, through contributed essays that more or less follow a uniform analytical framework, they examine the supervision of government behavior in major international economic organizations. Second, they bring the individual organization studies together through comparative observations on the "supervisory mechanisms" of international economic organizations in general, including but not limited to the organizations studied. Finally, they attempt to relate the whole to "the perspective of a restructuring of the international economic order," meaning, specifically, current efforts to fashion the NIEO, the "New International Economic Order." Each task is well worth a book in itself or, in the case of the organization studies, a series of books. To have undertaken all three tasks in the scope of a single volume, albeit a large volume, unavoidably leads to shortcomings, which will produce calls for more information and more extensive analysis. As inevitable as such criticisms may be, they should not obscure the editors' accomplishments. We have in this volume, largely for the first time, a detailed comparative study of components of what I would call the lawmaking methodologies of international organizations.¹ Such a study is long overdue and is to be heartily welcomed.

The editors' analytical framework is structured around three "functions of international supervision": the review function, the correction function and the creative function.² The "review function" is the process of judging whether government behavior conforms to a rule of law. Such review is performed and evaluated in relation to the purposes of the organization as those purposes evolve over time. "Rule of law" here means both rules of a legally binding character and rules that are not legally binding but are "instrumental to the achievement of the purposes of the organization" (p. 720).³ The "correction function" is "designed to ensure . . . compliance with international legal obligations through persuasion or pressure from outside" (p. 733). Strict compliance is not always sought, however. Where rules have not kept pace with the organization's evolving purposes, the correction function may reshape the rules, directing future government behavior in line with changed policy goals (p. 734). In this sense the "correction function" shades off into the "creative function," which is to clarify and elaborate

¹ See Partan, *International Administrative Law*, 75 AJIL 639 (1981). An early study, *THE EFFECTIVENESS OF INTERNATIONAL DECISIONS* (S. Schwebel ed. 1971), comprised the papers and proceedings of a conference convened by the American Society of International Law in 1967.

² The three functions are introduced at pp. 11-14, and discussed in greater detail at pp. 720-21 (the review function), 733-35 (the correction function) and 747 (the creative function).

³ The editors comment that effective supervision may also add to "the normative value of the norm whose implementation is supervised" (p. 713), citing Judge Lauterpacht's opinion in the Advisory Opinion on South-West Africa—Voting Procedure, 1955 ICJ REP. 67, 120-21.

existing rules "to make them sufficiently specific to be applied in a concrete case" (p. 747). Here the editors comment that "adaptations of the purposes, principles, procedures and rules of the international economic organisations towards a more just and equitable international economic order may be effectuated outside the formal framework of an amendment procedure through the creative function of supervision" (*id.*). The editors do not identify specific "adaptations" that have led (or will lead) to "a more just and equitable international economic order," but rather seem only to be making the more general point that supervision of government behavior through international economic organizations can shape the state practice needed for such change.⁴

The analytical framework just described is applied to eight international organizations: the General Agreement on Tariffs and Trade (GATT); the Textiles Committee and the Textiles Surveillance Body established by the Multi-Fibre Arrangement (MFA) concluded under the auspices of GATT; the United Nations Conference on Trade and Development (UNCTAD); the International Monetary Fund (IMF); the International Bank for Reconstruction and Development (World Bank); the International Atomic Energy Agency (IAEA); the Organisation for Economic Co-operation and Development (OECD); and the Council for Mutual Economic Assistance (CMEA). The GATT study is by far the longest (175 pages); it discusses GATT supervision through each of the several procedures developed directly under the General Agreement and under supplemental agreements such as the Anti-Dumping Codes of 1967 and 1979 and the Subsidies Code of 1979. The bulk of the GATT study is given over to descriptions of GATT procedures and summaries of their histories; brief evaluations are given for each procedure and an overall concluding section discusses the "Effectiveness of GATT Supervision" in terms of the editors' three categories.⁵ Several of the other organization studies take the same approach: a relatively lengthy description of the organization's supervision procedures is followed by commentary on the effectiveness of the organization's supervision, addressing separately the review function, the correction function and the creative function.⁶ The IMF study departs from this pattern. The author comments that the supervisory functions of the IMF do not neatly fit the pattern developed by the editors. In the IMF there has been an "evolution from norm control to guidance of policy," which means that it is no longer possible to distinguish clearly between the three functions of supervision.⁷ The general editors see this shift as in effect a maturing of the regulatory system. The earlier rules, based upon sovereign freedom and the sovereign equality of states, "contain many implications for the economic policy of the States, but do not directly interfere with the way the States conduct their economic

⁴ See the editors' discussion of the NIEO and the development of international law at 707-13.

⁵ Supervision through GATT procedures is described and evaluated at 71-189; the effectiveness of GATT supervision is discussed at 194-204.

⁶ See, e.g., the UNCTAD study, written by assistant editor K. de Vey Mestdagh, at 277-349. UNCTAD supervision is described at 297-330; effectiveness is discussed at 330-41.

⁷ See pp. 381-86 and 393. The IMF study was written by R. Barents.

policy in order to implement the basic rules." With trade and interdependence, however, states acquire a greater interest in the economic policy of other states, leading to supervision by international organizations of economic policy developed by states. The maturation theme is suggested only in the context of IMF supervision, but the idea is presented in terms equally adaptable to supervision by other organizations and especially to what the editors appear to favor as the restructuring of the international economic order.⁸

The editors' analytical framework, which addresses supervision in terms of the review, correction and creative functions, enables them to present data drawn from quite different organizations in a uniform format to facilitate comparison. The editors quite rightly warn, however, that not all such data may in fact be comparable. For this reason, the editors present all supervision data in the context of each full organizational report, inviting the reader to assess comparability by studying the actual functioning of supervision in each organization and to draw his or her own conclusions as to comparability (p. 693). The editors also warn that common patterns found across organizations "by definition must present a certain degree of abstraction" (*id.*). This said, the editors offer rather a modest number of "comparative observations" about the supervisory mechanisms used in the organizations studied and at the same time attempt to relate these observations to the larger picture of the restructuring of the international economic order (pp. 718-61).⁹

The editors' tripartite structure does provide a convenient framework for thinking about supervision, especially when it is recognized that often the norms subjected to supervision are not binding or are in the process of emerging as rules of international law. The three supervision functions are hardly discrete, however. The "creative function" seems to this reviewer normally bound up with both the "review function" and the "corrective function." Van Hoof recognizes this in commenting, in his essay on *Supervision Within the World Bank*, that all three functions "involve interpretation, but the creative function may go beyond mere interpretation and take on law-making characteristics" (p. 460). Lawmaking, he says, goes beyond supervision, overstepping the bounds of the creative function (p. 461). Comments in this vein leave unclear just what is meant by "creative," which elsewhere seem to comprehend fashioning, expanding and even restructuring international economic norms through the very processes of supervision (see pp. 707-13, 720, 733-34 and 747).

The editors' comparative observations contain much sound commentary on supervision by international organizations. The discussion of data collection,¹⁰ for example, could be read with profit by anyone seeking to design international mechanisms for exchanging information on matters of international concern. Many observations seem connected in only a very general

⁸ See pp. 692-707 and 761. See also the IMF study at 384-91.

⁹ The editors' comparative observations are followed by excursive comments on supervision of codes of conduct for multinational enterprises (pp. 761-77) and "concluding observations" on the "need for development from power-oriented towards role-oriented structures" (pp. 777-95).

¹⁰ Pp. 724-33, especially the list of factors given at 728-29.

way to the data contained in the individual organization studies, however. For example, with regard to secretariats, the editors assert that independence from national authorities must be guaranteed if the secretariat is to "acquire the status of an authoritative source" (p. 732). While the observation may be unexceptionable, it is not related to the findings of any organization study. Again, although the editors recognize that sanctions are seldom used in the organizations studied, broad conclusions are stated as to the conditions under which sanctions are likely to be effective (pp. 746-47). Other conclusions are more closely tied to the reported data. Successes and failures in data collection among the OECD, the CMEA and the GATT are explained in a pattern that reflects the differences among these organizations (pp. 724-27). The role of political debate in the "correction function" is similarly analyzed with reference to experience in the World Bank, the GATT, UNCTAD and the OECD (pp. 735-38).¹¹ Here the "confrontation technique" of the OECD provides support for the view that the correction function can work well when conducted behind closed doors. State policies are explained and defended in closed sessions in which small groups of representatives "confront" the policies of others, demanding detailed explanations "motivated . . . by the common interest the States have in the fulfilment of the obligations of each of them" (p. 737).¹² Subsequent publication of a report or communiqué is seen to have only a limited corrective effect; "the main correction must have been obtained during the examination *in camera*."¹³

Bringing the separate organization studies together is no easy task despite the aid of the editors' common analytical structure. The editors have made a beginning through their comparative observations, but these fall short in too often seeming to lack roots in the organization data. Readers are invited to make their own comparisons, but are not given the tools needed to do so. There is no index, and the footnotes, while copious, do not systematically trace issues through the mass of the individual studies. Thus, while the studies stand on their own as sources of information about the supervisory practices of major economic organizations, there is no ready way to discover what each study may have to say on any particular supervision issue. The common format helps to a degree, but, as has been observed, that format neither was nor could be used with equal success in all cases.

In sum, *Supervisory Mechanisms in International Economic Organisations* has undertaken a great deal in a subject still in its infancy. Its shortcomings make the work less effective than it might have been,¹⁴ but they should not obscure the work's solid contribution both by way of the individual organization

¹¹ There are also references to studies of the European Communities and other organizations not directly covered in the work under review.

¹² See also the OECD study at 532-33, 536, 541 and 553-54.

¹³ P. 737, citing to the OECD study at 588-89.

¹⁴ In addition to the lack of an index, which I consider essential in a work of this kind, and the conceptual problems mentioned in this review, the work does not include biographies of either the editors or the authors of the individual organization studies. The individual organization studies are also not dated, but the documentation shows that in most cases research probably concluded in 1980.

studies and the measure in which the editors succeed in extracting generalized lessons from the individual studies.

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External Debt Management. Edited by Hassanali Mehran. Washington: International Monetary Fund, 1985. Pp. x, 322.

This book is a collection of papers presented at a seminar on external debt management held under the auspices of the International Monetary Fund (IMF) in December 1984. This is a timely volume, in light of the difficulties that have been experienced by many developing countries with large external indebtedness. Most of the contributors are officials of the IMF or the World Bank, which have been active in the multilateral management of the international debt problem. The institutional nature of the book is both a disadvantage and an advantage.

It may be a disadvantage in that the book has a relatively narrow range of perspectives. The IMF has had a central role to play in coordinating new public and private loans to developing countries that have been unable to attract voluntary funds in the international capital market. The IMF's assistance is normally conditioned upon the debtor country's agreement to adopt an economic adjustment program to resolve balance-of-payments difficulties. A typical IMF program calls for rapid implementation of macroeconomic policies that reduce imports, drastically cut public spending and eliminate many public subsidies, remove obstacles to direct foreign investment and realign exchange and interest rates. All of the authors implicitly assume that the IMF ought to have this critical role in working out debt relief arrangements and that the standard policy prescriptions are useful. These are now controversial propositions,¹ and a critical discussion of the benefits and problems of the IMF's role would have been useful in a book such as this one.

Moreover, the book tends to be uncritically optimistic about the ability of the international financial system to work its way out of the debt dilemma. The opening remarks of IMF Managing Director de Larosière bubble with wishful thinking (ch. 1). The managing director points to the adoption of IMF adjustment programs in over 30 countries, in exchange for new lending to those countries by multilateral financial institutions and private commercial

¹ See, e.g., *THE IMF AND STABILIZATION: DEVELOPING COUNTRY EXPERIENCES* (T. Killick ed. 1984); Hurlock, *Debt Restructure Agreements: Perspective of Counsel for Borrowing Countries*, in *A DANCE ALONG THE PRECIPICE: THE POLITICAL AND ECONOMIC DIMENSIONS OF THE INTERNATIONAL DEBT PROBLEM* 119 (W. Eskridge ed. 1985); Killick, Bird, Sharpley & Sutton, *The IMF: The Case for a Change in Emphasis*, in *ADJUSTMENT CRISIS IN THE THIRD WORLD* (Feinberg & Kallab eds. 1984). Professor Karl Meessen of the University of Augsburg presented a paper at the Annual Meeting of the American Society of International Law in April 1986, in which he argued that the IMF's adjustment programs did not produce long-term structural change and that the role of the IMF ought to be reduced. Indeed, in the panel discussion and the questions from the floor, there was remarkably little scholarly interest in preserving a critical role for the IMF.

banks, and boasts that "[t]his strategy has worked" (p. 26). He particularly approves of the 1984 Mexican restructuring agreements, which rewarded Mexico's improved economic performance with a spreading out of the repayment of its outstanding debts (p. 29), and several other authors are similarly hopeful (e.g., pp. 52, 137-44). The Mexican example is perhaps an unfortunate one in retrospect, for 1985-1986 has seen Mexico tumble from "hero" status among international financial experts, to "problem" status again, in part because the country's implementation of its IMF adjustment program proved to have been half-hearted and short term. The optimism prevailing in the book may reflect the circumstances at the end of 1984 when the seminar was held, but it should be noted that other conferences on the international debt problem in 1984 did not suffer from such naive optimism because they drew contributions from a broader range of sources.²

On the whole, those chapters describing the "successes" of international debt restructuring (chs. 1-4 and 8-9) suffer from the glare of subsequent events and existing scholarship. Still, *External Debt Management* does not suffer overmuch from this problem because its primary focus is not the IMF's macroeconomic policy prescriptions but instead nuts-and-bolts advice to indebted countries about how to manage their external indebtedness more effectively. Here, the institutional status of the contributors is an advantage, for the IMF and the World Bank are among the best sources of public information about international indebtedness, and the experience their officials have gained in dealing with indebted countries and their creditors has given them invaluable insights into the practical needs of debt management. There is far too little scholarship on the mechanics of debt management by underdeveloped countries, and this book is a useful starting point for such scholarship. Three important themes of debt management are treated in some detail by various contributions in this book.

First, one of the most serious problems for underdeveloped countries has often been insufficient data about the debt they owe. Several of the chapters point out the information problems faced by debtor countries and suggest reliable sources of information. K. Burke Dillon and David Lipton, both of the External Finance Division of the IMF's Exchange and Trade Relations Department, argue (ch. 2) that "collection of information on the size and composition of a country's indebtedness is vital to the process of external debt management" and that "[r]eliable and timely information on private debt and short-term debt is . . . often unavailable or very limited in coverage" (p. 34). Dillon and Lipton describe the data bases available through the IMF and the World Bank and emphasize the importance of obtaining not only current data, but also projections of debt growth (pp. 35-43). The work of the IMF in gathering, analyzing and promulgating external debt statistics is set forth by John O'Connor, the chief of the International Banking and External Debt Division of the IMF's Bureau of Statistics (ch. 11). By systematically combining information on a country's external debt from all major debtor and creditor sources, the IMF is developing a detailed

² The published results of two colloquiums held in 1984 may be found in *A DANCE ALONG THE PRECIPICE*, *supra* note 1; and 23 COLUM. J. TRANSNAT'L L. 1 (1985).

composite picture of the debt position of each country. Nicholas Hope, the chief of the World Bank's External Debt Division, describes his institution's "Debtor Reporting System" (DRS) but argues that debtor countries must do a better job of monitoring their own indebtedness and developing good accounting systems to record and monitor their external debt (ch. 12).

Hope's argument suggests a second operational theme of the book: developing countries need to establish new and permanent institutional structures to facilitate external debt management. A short introduction to external debt accounting issues by IMF consultant Gérard Aubanel (ch. 10) argues for the establishment of an external debt accounting unit, usually within the country's central bank, which will systematically gather information concerning the public and private debt of the country, and monitor the growth of that debt. Guillermo de la Dehesa describes in greater detail the institutional administrative structures for managing external debt (ch. 5), which includes "the control, by administrative measures, of the volume, currency, instruments, and terms of foreign currency borrowing, both for the public as well as the private sector" (p. 91). De la Dehesa broadly categorizes countries into those without exchange controls but with reporting mechanisms for external transactions; those with exchange controls but no prior approval of external debts; and those with exchange controls and systems for prior approval of external debts (most developing countries). He finds that most existing control arrangements are too inflexible and not forward-looking enough. There should be one centralized administrative unit that gathers data systematically, issues warnings to the government when the level of debt is becoming unsustainable and develops strategies for the active search for external funds on optimal terms (pp. 94-96).

Strategies for external borrowing constitute the third operational theme of this book. One of the causes of the current crisis was the terms under which developing countries borrowed money in the 1970s: most of it came from private commercial banks, at nonconcessionary interest rates that floated with inflation, for short and medium terms, and in dollars rather than a bundle of different currencies. By a thoughtless borrowing strategy, many developing countries (especially those in Latin America) were more vulnerable to international economic shocks than they ought to have been in the years between 1979 and 1982. The lessons of this experience are excellently distilled in the contribution by Lars Kalderen, the Director General of the Swedish National Debt Office (ch. 6). He gives useful advice to debtor countries on such operationally critical issues as

the choice between public and private sector debt; the maturity structure and currency composition of the debt portfolio; measures to protect the borrower against fluctuations in interest costs and exchange rates; the creation and use of lines of credit as a cushion against changes in the availability of market credit; and the coordination of a number of borrowers . . . to optimize the use of various markets [p. 99].

Kalderen's basic advice is for debtor countries to be continually alert for market signals and to retain enough flexibility in their debt structure to permit adjustment in response to those signals. His insights are complemented by a short contribution by José Angel Gurría Treviño, Director General of

Mexico's Ministry of Finance and Public Credit, who provides a step-by-step outline of the borrowing strategies by debtor countries negotiating loans with private commercial banks (ch. 7).

The book concludes with 22 case studies of external debt management in selected countries. Some of the case studies, such as those for Denmark and Portugal (pp. 208-18 and 251-64), are quite detailed and sophisticated, while others are perfunctory. It is striking that Jamaica and Chile are the only Latin American countries included; given the overwhelming importance of that region in the current international debt problem, one might have expected more emphasis here. The strategies of Brazil, Mexico and Argentina would be not only interesting case studies of change in response to the pressure of events, but important case studies because of the multibillion dollar loan commitments by Western banks to each of these countries.

External Debt Management probably covers too many topics to treat any of them in detail, and some of its macroeconomic analysis is shopworn or outdated. The book's main contribution is to emphasize the central importance of operational features of debt management: the collection and analysis of systematic information, the creation of a flexible and rational administrative structure to monitor and advise about the country's external debt situation, and the development of debt strategies by Third World countries.

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International Law of Take-Overs and Mergers. Vol. 1: *Asia, Australia, and Oceania*; vol. 2: *United States, Canada, and South and Central America*. By H. Leigh Ffrench. New York, Westport and London: Quorum Books, 1986. Vol. 1: pp. ix, 457. Indexes. \$65. Vol. 2: pp. viii, 359. Indexes. \$55.

These books by H. Leigh Ffrench, Associate Professor in the Department of Commerce at the University of Queensland, are the first two of four projected volumes, part of an ambitious undertaking that the author promises "will embrace the legal regulation of company take-overs and mergers in most countries in the world where private companies are part of the economic system" (vol. 1, p. vii).¹ The books are basically expository, not critical, although they do describe reform proposals in a few countries.

All of the countries considered in these volumes—from the United States and Japan at the one extreme to Honduras and Brunei at the other—are said to have some form of regulation of mergers. Not all of them regulate takeovers. On the other hand, with respect to some countries, the work describes other types of regulation insofar as they impinge on mergers or takeovers: for example, insider trading, foreign investment, antitrust and restrictive trade practice rules, as well as labor laws in relation to termination of employment as the result of a takeover or merger.

The author has managed to navigate this maelstrom essentially on his

¹ This is not the author's first Augean feat. See B. RIDER & L. FFRENCH, *THE REGULATION OF INSIDER TRADING* (1980), a worldwide treatment of that subject.

own. Instead of enlisting a squadron of authors, he has relied on several years of research in the United States, Canada, Europe, Hong Kong and Australia. In all the countries he interviewed local experts. He mentions particularly the availability of experts (can it be on mergers and takeovers?) from almost every country in the world at the Library of Congress in Washington.

This decision on his part to go it alone may be just as well. The 1983 publication of *Japanese Securities Regulation*—a collection of 11 chapters written by as many Japanese experts—occurred 21 years after the first of three seminars, two of them week-long, in Tokyo!² And any company that contemplates a merger or takeover involving a company in another country will retain local counsel in any event. The purpose of the present work is simply “to reduce, as much as possible, a reluctance of any company to integrate with companies in another country, which reluctance may be based on ignorance of the home country’s laws and feared pitfalls therefrom” (vol. 1, p. viii).

This work usefully complements the substantial literature on particular countries.³ Happily, too, the author promises annual or biennial supplements, as well as new editions when required.

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Lineamenti di diritto comunitario. By Tito Ballarino. Padua: CEDAM, 1985. Pp. vii, 183. L. 13.000.

One of the difficulties encountered in covering the whole spectrum of the law of the European Communities, be it in a treatise or a concise summary, is the multifaceted competence needed.

The Communities are an international organization in terms of their basic instruments and act as such in their relationships with nonmember countries. Their relations with member states, and the integration of Common Market law with domestic legal systems have created a wholly original structure. Constitutional law principles are to be taken into account when dealing with sources of law and the protection of the rights of individuals in the Com-

² JAPANESE SECURITIES REGULATION (L. Loss, M. Yazawa & B. Banoff eds. 1983).

³ In the English language alone, see A. VICE, *THE STRATEGY OF TAKEOVERS: A CASEBOOK OF INTERNATIONAL PRACTICE* (1971); P. ANISMAN, *TAKEOVER BID LEGISLATION IN CANADA: A COMPARATIVE ANALYSIS* (1974); Tan, *The Singapore Code on Takeovers and Mergers: An Introduction*, 44 MALAYA L.J. at lxviii (1975); M. WEINBERG & M. BLANK, *TAKEOVERS AND MERGERS* (4th ed. 1977); Macgregor, *Takeovers Revisited*, 95 S. AFR. L.J. 329 (1978); Santow, *Defensive Measures against Company Takeovers*, 53 AUSTL. L.J. 374 (1979); Lepine, *The French General Philosophy Concerning the Transfer of Controlling Interests and the New Takeover Bid Rule*, in *NEW TRENDS IN COMPANY LAW DISCLOSURE* 269 (L. Gower, L. Loss & A. Sommer eds. 1980); Carvalhosa, *The Brazilian Experience with Respect to Tender Offers*, 3 J. COMP. L. & SEC. REG. 103 (1981); Witterwulghé, *Takeover Bids in Belgium*, 5 J. COMP. BUS. & CAPITAL MARKET L. 41 (1984); Howard, *Current Takeover Law*, 15 MELB. U.L. REV. 31 (1985). Tender offers will also be covered in *INTERNATIONAL SECURITIES REGULATION* (Rosen ed.), a loose-leaf service, scheduled for publication by Oceana Publications, Inc., which is to contain the text and a descriptive analysis of the regulatory scheme in 14 countries and the EEC.

munities. On the other hand, dealing with the most significant substantive areas of Common Market law requires the competence of corporate lawyers, antitrust specialists, customs, patent and tax law experts as the case may be, plus a background of comparative law. The most complete treatises or commentaries are, therefore, as a rule the work of teams of authors, while single-handed efforts tend to underline some aspects of the system, usually the institutional ones when they are the work of international lawyers, as is most often the case. This work by Tito Ballarino, in the form of a concise introduction to Common Market law, is no exception to the rule, being the work of a distinguished international lawyer.

The book covers the whole of the subject: historical evolution (not including, of course, the latest amendments to the EEC Treaty agreed upon in Luxembourg on January 27, 1986); institutional structure; basic substantive provisions (freedom of movement, antitrust law, economic and monetary cooperation); the sources of Community law; the competence of the Court of Justice; the fundamental principles of the Community; interrelations with domestic law (especially with respect to Italy); and the Community as a subject of international law. However, questions concerning sources and principles of law, the jurisprudence of the EC Court and the interrelation with domestic law constitute most of the book.

The fundamental features of Community law are systematically set forth, with substantial reference to the case law of the Court. Of special interest is the review of the "general principles of Community law" (pp. 120-34): principles related to the basic economic philosophy of the Community such as those of equality or nondiscrimination, economic freedom, solidarity and the unity of the Common Market. Other principles relate to the fair application of any Community rule: proportionality; reliance by private parties on the consistency of Community legislation; systematic and teleological interpretation in order to guarantee the effectiveness of the Community order; and the protection of fundamental rights.

The book commends itself as an introduction to the Community legal system for those unfamiliar with it and also for the nonlawyer who is looking for a comprehensive and handy treatment of the subject, though the addition of a bibliography would have been useful to this end.

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From Helsinki to Madrid. Conference on Security and Co-operation in Europe. Documents 1973-1983. Edited by Adam Daniel Rotfeld; selected and verified by Z. Lachowski and A. D. Rotfeld. Warsaw: Polish Institute of International Affairs, Co-operative Publishers. Pp. 347. Zł. 200.

Dr. Rotfeld was a member of the Polish delegation to the Madrid and earlier Conference on Security and Co-operation in Europe (CSCE) meetings. His book contains parallel English and Polish texts of an introduction, and later reproduces, also in both languages, a number of pertinent documents. The latter are ordered into two sets: the first embraces 10 CSCE documents starting with the Final Recommendations of the Helsinki Consultations

(1973) and the Final Act of the CSCE (1975), and ending with the Concluding Document of the Madrid meeting (1983); the second set reproduces 16 items with different Polish (or Polish-cosponsored) proposals submitted to various CSCE meetings.

The relatively short introduction of some 35 pages is, of necessity, very general. Literature on the topic is tremendous: the author mentions (p. 13) that he has recorded over two thousand bibliographical items (books and articles) dealing with various aspects of the CSCE. The introduction consists of the following parts: "General Remarks," "Origins of the CSCE Process," "Course of the CSCE," "Decisions of the CSCE" and "Continuity of the CSCE Process."

Replete with well-balanced information, the introduction is, to a great extent, written in a fairly objective manner; of course, certain things are passed over in silence, especially the role the Polish situation played at Madrid in 1982-1983. The language is moderate and without any Party jargon. All this is in contrast to the pertinent Soviet (and East German) publications. Suffice it to compare it with, for example, the longish 10th anniversary article *Successes, Difficulties, Hopes* by L. Tolkunov, Chairman of the Soviet Committee for European Security and Cooperation, in *Pravda* of July 8, 1985.

After having sketched some extremely different assessments of the CSCE, running "all the way from unqualified approval to extreme criticism," the author writes: "What is the truth? What determines the value of the CSCE decisions? What is unique about the multilateral process of security and co-operation initiated in Helsinki? The real state cannot be perceived without access to the sources, to the original documents" (p. 14).

One can only agree with this approach and express the wish that the integral texts of the respective documents be published much more often in Eastern works on international law and relations.

The present collection is timely and convenient. Regarding the political aspects of the CSCE, as seen from our side, emphasis must be on two statements, made by Western statesmen, of which Rotfeld reminds us: "History will judge this Conference not by what we say here today, but by what we do tomorrow—not by the promises we make but by the promises we keep" (former President Gerald Ford, Helsinki, August 1975). And regarding our primordial concern with human rights: "In the language of Helsinki, Basket I will be empty unless there are plenty of eggs in Basket III" (Sir Alec Douglas-Home, Helsinki, July 1973).

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Basic Documents on United Nations and Related Peace-Keeping Forces. By Robert C. R. Siekmann. Published under the auspices of the T.M.C. Asser Instituut. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xviii, 273. Index. Dfl.140; \$44.50; £38.75.

For those who are engaged in research on "United Nations and Related Peace-Keeping Forces," this book will be welcome. It will save many hours

that would otherwise be spent trying to find these "basic documents" in a UN depository library, using the almost incomprehensible UN index system. In a more perfect, or at least less imperfect, world, however, these researchers (or the libraries they use) could save themselves \$44.50, since UN depository libraries receive most of these documents free of charge.

In this less than perfect world, several book publishers—Oceana is the prime example, Martinus Nijhoff is another—are able to make substantial profits by putting UN or other documents of interest to those working in the fields of international law and international relations between the covers of a hard-cover book, having an "expert" in the field write a brief (often very brief) introduction, adding an even briefer preface by an "eminent authority" and selling the resulting product for truly astronomical sums. This reviewer believes this process is a "rip-off" of consumers, who are most often law school or other academic libraries that all too often indiscriminately purchase anything produced by these publishers.

This review would be less critical if the editors of these books were to make a greater contribution to them. For example, in the book under review, Mr. Siekmann's contribution is limited to selecting the documents and writing a two-and-a-quarter-page introduction (pp. vii–ix), which explains the different meanings of "United Nations peace-keeping operations," noting that this book includes only documents concerning peacekeeping forces (as compared, say, with purely observer operations).

More should be demanded. At a minimum, editors should be expected to write a fairly elaborate commentary on the various documents, guiding the reader to the most important provisions of these documents and explaining why they are important. Key provisions of documents should be compared and contrasted so as to highlight crucial differences, and the significance of these differences, regarding the establishment, goals, financing, operations and effectiveness of these peacekeeping forces. An editor also might be expected to add a scholarly dimension to afford a context for the raw material represented by the documents.

It is not even clear that Siekmann, as editor, has done any real editing. For example, although the Advisory Opinion of the International Court of Justice concerning *Certain Expenses of the United Nations*¹ is printed in full (p. 107), no excerpts from the concurring or dissenting opinions in that important case are reproduced; nor is there any commentary from Siekmann on the significance of the Court's opinion.

Similarly, there is no commentary on the documents relating to the two multinational peacekeeping forces established outside of the United Nations in the Middle East: the Multinational Force and Observers (MFO) in Egypt and the now disbanded and discredited Multinational Force (MNF) in Lebanon. The establishment of these two forces was an event of enormous significance. But one will gain no insight into the reasons for this significance from Siekmann.

¹ 1962 ICJ REP. 151.

One cannot help but compare, and unfavorably, this book with the scholarly four volumes of Rosalyn Higgins on *United Nations Peacekeeping*.² Future volumes are now in the process of being written by Professor Higgins and her coauthor, Richard Nelson. They are greatly needed.

Perhaps it is a bit unfair to be too harsh on Siekmann for adhering to existing patterns encouraged by the publishers. To be sure, Siekmann's book does contain useful, up-to-date materials on peacekeeping not easily obtainable elsewhere. These include documents on the following peacekeeping forces: the United Nations Emergency Force (UNEF, p. 1); the Opérations des Nations Unies au Congo (ONUC, p. 69); the United Nations Security Force (UNSF, p. 131); the United Nations Force in Cyprus (UNFICYP, p. 145); the United Nations Emergency Force (UNEF "II," p. 183); the United Nations Disengagement Observer Force (UNDOF, p. 197); the United Nations Interim Force in Lebanon (UNIFIL, p. 205); the United Nations Transition Assistance Group in Namibia (UNTAG, p. 217); the Multinational Force and Observers (MFO, p. 277); and the Multinational Force (MNF, p. 259). In addition, the book contains the previously mentioned *Certain Expenses Advisory Opinion* (p. 107) and the 1977 Draft Formulae for Articles of Agreed Guidelines for United Nations Peace-keeping Operations (p. 233).

What is most needed, in this reviewer's opinion, is easier access to the wealth of material contained in UN documents. Two indispensable steps to this end would be an improvement in the indexing of UN documents and more training for reference librarians in the use of these documents. In an acknowledgments section, Siekmann reports that he used the resources of five institutions and organizations in reproducing the materials and documents that appear in the book: the United Nations, the American Society of International Law (*International Legal Materials*), the Controller of Her Britannic Majesty's Stationery Office, and the International Court of Justice and Staatsuitgeverij, in The Hague, the Netherlands. This well illustrates the difficulty facing those who research in the fields of international law and relations.

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Peacekeeping: Appraisals & Proposals. Edited by Henry Wiseman. Published for the International Peace Academy. New York: Pergamon Press, 1983. Pp. xiii, 461. Index. \$40.

This book contains a collection of 16 essays arranged in five parts, by subject area. The work begins with a historical review and analysis of peace-

² R. HIGGINS, UNITED NATIONS PEACEKEEPING: DOCUMENTS AND COMMENTARY (4 vols., 1969, 1970, 1980, 1981).

keeping. The three subsequent parts discuss, respectively, national perspectives, operational considerations and regional peacekeeping. The concluding part focuses on peace, law and the future.

The first two essays deal with aspects of a general character. Indar J. Rikhye's essay on *Peacekeeping and Peacemaking* concentrates on peacekeeping since 1947. The author of this article describes the different connotations of the term "peacekeeping" and provides a brief historical account of the most important cases of peace observation and peacekeeping under the United Nations and under regional arrangements. Despite the excellent quality of this essay—and the distinguished credentials of its author—some of the cases and the complicated issues involved merit more in-depth analysis.

The historical overview by Henry Wiseman contains a more detailed analysis of the origins and evolution of the concept of peacekeeping, which the author divides into four periods: namely, the slow growth "nascent period," which covers the early efforts of the United Nations in that field; the "assertive period," which, according to Wiseman, begins with the establishment of the United Nations Emergency Forces (UNEF I) in 1956 and ends with the withdrawal of those forces from the Middle East in 1967; the "dormant period" between 1967 and 1973; and, finally, the "resurgent period," which began in 1973. This reviewer shares the conclusion, advanced by Rikhye and Wiseman, that the practice of peacekeeping has been greatly affected by factors stemming from the East-West confrontation and by the process of decolonization.

Although these two monographs review topics that have already been discussed in other writings, both essays are well written and cogently presented.

Part II deals with national perspectives with regard to UN peacekeeping. One essay, by Nabil Elaraby, is devoted to the Egyptian experience. Another, by Michael Comay, looks at the Israeli experience. The remaining two essays discuss, respectively, Canadian attitudes toward peacekeeping, by Geoffrey A. H. Pearson, and Canadian defense policy and peacekeeping, by Rod Bayers. Among the matters stressed by Elaraby in his essay on the Egyptian experience are former UN Secretary-General U Thant's controversial 1967 decision to withdraw UNEF I from Egypt without first consulting the UN General Assembly, and the question of consent by the host country. The author points out that "[Egypt's] right to request the withdrawal of UNEF I was an integral part of the exercise of its sovereignty on its territory." That may be so, but the argument that the only factor determining the continued presence of UN peacekeeping forces should be the "consent" of the host country is not entirely persuasive, primarily because it would vest the host country with absolute discretion tantamount to veto power. The author indicates, however, that in future UN peacekeeping operations it would be best "to cover all possible contingencies in advance" to avoid future disagreements regarding the presence and withdrawal of forces.

Part III discusses operational considerations. Brian Urquhart's essay on *Peacekeeping: A Review from the Operational Center* is commendable on two

counts: it provides a useful analysis of the several preconditions that could help make a peacekeeping operation successful; second, it describes the practical problems and complications that usually arise when an operation of that nature is mounted. The military aspects are discussed in an insightful study by J. D. Murray. There are two other articles in this part: one, by Clayton Beattie, examines the qualifications and extensive experience of the International Peace Academy in organizing training programs for international participation; the other, by William M. Stokes, describes how the use of sophisticated technology can contribute to the effectiveness of peacekeeping.

Regional peacekeeping is the main emphasis of three essays in part IV. In one of these essays, Nathan Pelcovits examines the African experience. David Cox contributes an interesting essay on *The International Commission of Control and Supervision in Vietnam, 1973*.

The essay on *Peacekeeping within the Inter-American System* by Edgardo Paz-Barnica contains an interesting overview of the organizational and functional aspects of peacekeeping operations within the OAS. However, this essay is too sketchy to be very useful. In addition, the reader of this essay will be able to detect one additional shortcoming regarding the terminology and proper denomination of some of the OAS organs, presumably derived from a poor translation from the original Spanish. For example, throughout the essay the Meeting of Consultation of Ministers of Foreign Affairs (a principal organ of the OAS) is referred to as "the Consultative Meeting of Foreign Ministers"; the provision of Article 53 of the UN Charter to the effect that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council" is quoted as follows: "No coercive action shall be carried out by means of regional agreements without the authorization of the Council" (p. 249); several actions taken prior to 1970 are attributed to the Permanent Council of the OAS, when in fact that organ did not exist at that time.

Part V contains three substantive studies. Wiseman's third contribution to the book concerns the *Dynamics of Future Development*, where he emphasizes the positive aspects of peacekeeping. Venkata Raman discusses the *United Nations Peacekeeping and the Future of World Order*. The volume concludes with a study by Alastair Taylor on *Peacekeeping: A Component of World Order*, which concentrates mainly on what the author considers to be the traditions and paradigms of the international political environment, and on the concepts of peacekeeping and peacemaking as components of world order.

The volume pulls together a variety of important issues surrounding a complex topic that concerns not only the United Nations but regional organizations as well. It constitutes a useful addition to the literature on peacekeeping and should be strongly recommended to those interested in the subject.

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International Wildlife Law. By Simon Lyster. Cambridge: Grotius Publications Ltd., 1985. Pp. xxiii, 470. Index. \$37, cloth; \$17.50, paper.

A boy coming of age in North Yemen is presented with a traditional dagger with a handle carved from rhino horn. In Nepal the skinned carcass of a snow leopard lies on the side of a mountain. In Kenya an elephant foraging for food invades a farm. In the Philippines a monkey-eating eagle watches as his forest preserve is bulldozed away. A cargo ship from Nicaragua carries sea turtles to Japan. In Indonesia birds ingest food laden with DDT. In the heart of Africa a swamp inhabited by slender-snouted crocodiles is drained to grow vegetables for European dinner tables.

Throughout the world, various species of wildlife are being threatened by loss of habitat, illegal takings and pesticides and other pollutants. Some species have already disappeared, some are in imminent danger of becoming extinct. Others, though still plentiful, face an uncertain future. The use of international treaties to protect wildlife is largely a phenomenon of the 20th century. The first such treaty relating to birds, Simon Lyster tells us, was entered into among 12 European countries in 1902 "for the protection of birds useful to agriculture." The first multilateral treaty for the protection of fur seals (among Japan, the United Kingdom [on behalf of Canada], the USSR and the United States) was entered into in 1911. France, Germany, Great Britain, Italy, Portugal and Spain, on May 19, 1900, signed an agreement "to prevent uncontrolled massacre and to ensure the conservation of diverse wild animal species in their African possessions which are useful to man or inoffensive."

Mr. Lyster has performed an extremely valuable service in his book *International Wildlife Law*, by drawing together the major international wildlife treaties now in existence and giving us a systematic analysis of the provisions of these conventions. The work represents a real tour de force and lawyers and others concerned with the international protection of various species will be grateful to Lyster for leading them through sometimes thick underbrush, over rough seas or across desolate tundra, as the case may be. (Lyster has cleverly reproduced 12 of the conventions in an appendix to the book, and an examination of them immediately reinforces the reader's gratefulness for Lyster's careful explications.)

The book begins with a discussion of the basic principles of treaty law. Seasoned internationalists may skip over this, but it will help those who have heretofore looked at wildlife protection only in domestic terms and those who do not have a background in public international law. The central focus of the book is the analysis of the treaties and, for this purpose, Lyster divides the conventions into three groups. The first includes treaties that protect a single species—whales, seals, polar bears, birds and vicuña—and that focus largely on trade and killing rather than habitat protection. The second group includes regional treaties that have habitat protection as a central concern. This includes treaties covering the Western Hemisphere, Africa, Europe and Antarctica. The final grouping is what Lyster terms "the big four"—

all treaties concluded in the 1970s and of true international scope or potential: the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat; the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage; the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora; and the 1979 Convention on the Conservation of Migratory Species of Wild Animals.

Aside from the analysis of treaty provisions, a major contribution of the book is the picture Lyster gives us of the historical development of the international protection of particular species and wildlife in general. Each chapter includes information on prior attempts to control international conduct with regard to a particular species of wildlife or in a particular region. Especially interesting is the way in which *motivations* for protecting wildlife have changed over the years. As indicated earlier, the earliest bird convention was entered into for the purpose of protecting birds that were considered useful to the protection of farmland. The 1900 colonial treaty on Africa emphasized wildlife that was "useful to man." The 1931 Convention for the Regulation of Whaling did not attempt to limit the number of whales killed, except for right whales and bowhead whales. And while the current Convention, which came into force in 1948, is designed to protect whales from overexploitation, it is also designed to "make possible the orderly development of the whaling industry." Concerns about extinction of wildlife on aesthetic and moral grounds and protection of habitat are relatively recent phenomena. And concerns for the protection of ecosystems, taking into consideration the relationships among species and between animals and birds and other parts of the natural environment, are of even more recent vintage. The 1970 Benelux Convention on the Hunting and Protection of Birds provides for the protection of habitat, the prevention of pollution and the control of pesticides. The 1973 Agreement on the Conservation of Polar Bears provides that the parties shall take appropriate action "to protect the ecosystems of which polar bears are a part, with special attention to habitat components such as denning and feeding sites and migration patterns."

The book plants several seeds for further studies to be done by lawyers and others concerned with international cooperation relating to the protection of wildlife. One would like to learn more about the *process* through which wildlife treaties come into being and the process through which they have a real impact on the world. What governmental and nongovernmental organizations sponsor such conventions? What motivates various parties and what are their agendas in negotiation? What has been bargained away? How are the interests of developing countries factored in? What are the roles—or nonroles—of various interest groups such as indigenous peoples, conservation groups, farmers and hunters in shaping the national policy that is carried to the conference table? Does the treaty incorporate a lowest common denominator approach, thereby encouraging countries themselves to enact minimal enforcing legislation? Or does the "reservation" system in fact work to preserve strong policy statements and provisions for at least *some* species?

Lyster emphasizes at several points the importance to the effectiveness of

a wildlife convention of having built-in administrative machinery that helps keep the problem of wildlife protection in constant view. He mentions, for example, the secr tariat established under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the "management authorities" and "scientific authorities" established in member countries pursuant to the Convention, as well as requirements that parties meet regularly. He does not, however, give us a sense of how effective the secretariat and the various authorities have been. Nor does he mention the important role of nongovernmental organizations—such as the World Wildlife Fund, which sponsors TRAFFIC (Trade Record Analysis of Flora and Fauna in Commerce)—in monitoring and documenting illegal trade in animals and in keeping the world conscious of the problem of illegal trade and habitat destruction. Lyster touches only briefly on the importance of national legislation in implementing the goals and provisions of wildlife treaties. It would be useful to know to what extent these conventions have influenced legislation in consuming and exporting countries.

There are many factors that undermine the effectiveness of wildlife conventions. Lyster discusses the practice, mentioned above, of states opting out of sections of treaties they are parties to. Thus Italy and France have taken "reservations" to the CITES Convention with regard to species of reptiles whose skins are used in their leather industries. Peru and Chile have "objected to" quotas imposed by the International Whaling Commission on the taking of Bryde's whales. And the effective implementation of treaties and domestic legislation, as they relate to illegal trade, assumes a customs service with specialized knowledge. Telling a CITES Schedule I endangered parrot from a Schedule II "look-alike" parrot may be difficult even for an ornithologist.

One of the most useful contributions of Lyster's book is the information on how wildlife treaties relate to each other. It would also be useful to know how they fit into the more general picture of international relations and relate to such issues as North-South trade. One basic fact of (wild)life is that pressure for conservation often comes from countries and groups that do not have to bear the social, political and financial costs of conservation. And conservation advocates often have world views quite different from those of people whose environment is affected by wildlife. In addition, while some issues affecting conservation of wildlife may be largely domestic—population planning, for example—some solutions for the underlying problems that lead to habitat invasion or killing of animals may require new forms of international cooperation. Access to adequate food for people, regulation of the export of pesticides and patterns of consumption of animal and bird products in the developed world are all part of the picture. And we must find new ways of financing wildlife preservation in developing countries. This may require a dramatic rethinking, for example, of the way in which the tourism trade operates. Do developing countries get their fair share of tourist expenditures or is tourism simply another example of inequity in the international economic arena? Finally, we have to take a closer look at the way in which mineral exploration and timber development affect bird and

animal habitats and consider the economic and ecological trade-offs more carefully than we have in the past.

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The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives. Edited by W. E. Butler. New York, London, Rome: Oceana Publications, Inc., 1985. Pp. x, 432. \$45.

The idea of an Anglo-Soviet symposium to assess the impact of the Third UN Conference on the Law of the Sea on the maritime concerns of the United Kingdom and the Soviet Union certainly has appeal. In fact, the idea spawned two symposiums, one in Moscow in April 1983, and the other in London in June 1984. This volume includes most of the English-language papers presented at the two symposiums, as well as translations of four of the papers originally presented in Russian.

In all, the book contains 18 papers, five on general aspects of the new Law of the Sea Convention, five on specific questions of maritime jurisdiction, four on environmental protection and the law of the sea, and four on international shipping. As one would expect with any such collection, it presents a curiously mixed product, sometimes penetrating, sometimes superficial, sometimes fascinating and sometimes annoying. The collection will be of some use to those seeking a general orientation to the new Convention, and to those seeking to study in greater depth the problems of protection of the environment and the law of the sea. Both sets of readers, however, should not expect all of their needs to be met by this book.

Given the targeted audience of the symposiums, those seeking an explanation of American attitudes towards the new Convention had better look elsewhere. There is no essay dealing with the American objections to the Convention, or the prospects of any major changes in the structure of the Convention in the near term, although several essays implicitly comment on certain key issues relating to these concerns. G. M. White's essay, *UNCLOS and the Modern Law of Treaties: Selected Issues*, stresses the "holistic nature" of the Convention, suggesting that no changes can be negotiated without renegotiating the whole Convention. W. E. Butler's essay, *State Practice and the Development of the International Law of the Sea*, concludes that the Convention is a step in the crystallization of customary international law rather than a "legislative act."

Comparativists will probably turn first to the four Russian contributions. These papers set forth the Soviet Government's views forcefully and clearly. As these positions are often difficult to find stated in English, the book will be significant if only for providing readily accessible evidence of quasi-official Soviet views.

P. D. Barabolia, in *Some Questions of the Legal Status and Legal Regimes of the Economic Zones of Coastal States*, demonstrates that the Soviet Union considers the exclusive economic zone as part of the high seas, limited only insofar as the new Convention confers limited rights on coastal states. As is

often true of Soviet positions on controversial questions of international law, this position on the status of exclusive economic zones is more conservative than the position either of many Western authorities or of many Third World states.

N. I. Rusina's essay, *International Legal Principles of Protection of the Marine Environment against Pollution*, presents a strong statement in favor of protecting the "World Ocean" against pollution of any kind. Mr. Rusina espouses the view that this is already required by international law and is merely redeclared under the new Convention. He likens pollution of the ocean to threats to the "ecological security" of nations and invasions of the human right to a healthy environment.

The remaining two Russian entries are less interesting. G. G. Ivanov's essay, *Some Questions of Private International Law in UNCLOS*, provides a survey of the provisions in the new Convention that relate to the conduct of private commercial shipping. M. Kharitonov and V. Shuvalov's essay, *World Maritime Trade and the Carriage of Dry Bulk Cargo: Some Problems and Prospects for Development*, addresses the economics of the world dry bulk cargo maritime trade, hardly touching on legal concerns at all.

Comparativists will also find several of the English essays to be significant sources of information about responses to the modern law of the sea from non-English-speaking countries. Particularly helpful in this regard are the essays of A. Boyle, *Regional Pollution Agreements and the Law of the Sea Convention*, F. Parkinson, *The Latin American Contribution to the Law of the Sea* and F. Weiss, *UNCLOS and the EEC: Some Legal Problems*. R. R. Churchill, *The Maritime Zones of Spitsbergen*, deals with a highly specialized but rather intricate problem.

The remaining essays are all surveys of particular topics with little original analysis. P. Birnie's essay, *Dispute Settlement Procedures in the 1982 UNCLOS*, is particularly thorough. Also helpful is H. G. Darwin (*The Preparatory Commission Established by the 1982 UNCLOS*) who reports on the work of the Commission in the first 2 years of its existence. G. Collier's essay, *The Regime of Islands and the Modern Law of the Sea*, is less significant. Collier omits any examination of the increasingly important issues of archipelagic states, largely restricting himself to reporting the results of disputes over the continental shelves of offshore islands. One can only speculate how F. Parkinson's second essay, *Prize Law in the Seventeenth and Eighteenth Centuries*, found a place in this book.

Several other essays are essentially summaries or analyses of the economics of certain aspects of environmental protection for the sea or international shipping, ranging from the oil pollution compensation fund, to shipping insurance, to flags of convenience. They also provide little analysis, but do provide substantial bodies of data that economists, lawyers and others could find helpful.

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International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching. Vols. I and II. Compiled and edited by Patricia Birnie. New York, London, Rome: Oceana Publications, Inc., 1985. Pp. xliii, 1053. \$50/vol.

This discussion of the International Whaling Commission's (IWC) activity from 1949 through 1983 should interest lawyers, natural scientists, economists and political scientists involved in or studying the international regulation of the use or conservation of living resources. Dr. Birnie, who has observed the IWC's proceedings at first hand for many years, has summarized the proceedings of each meeting and sought to place the Commission's changing policies in the context of international doctrine and practice relating to management of living marine resources.

The vast amount of information packed into this work makes it a resource to be mined according to one's interests, more than a work to be read from beginning to end. It begins with some facts about the habits and life cycle of each major whale species and a brief discussion of interwar efforts to regulate whaling. The summary of IWC meetings is then broken off at relevant points to note the changes in the general law of the sea, as well as the international treaties on management of fishing and taking of other marine creatures, and the attitudes towards exploitation of marine creatures that influenced each stage of the IWC's work.

The concluding chapter shows great awareness of the political and economic problems involved in the regulation of whaling, but the main text is less clear about how these problems influenced the positions taken in the IWC. The reader is reminded of environmentalist or industry pressures on individual governments, but it would be hard to assess from Birnie's treatment the extent to which these affected governments' policies. There is little information about the industry conditions that led some governments (particularly the Japanese and Soviet) to resist the reduction of quotas even when the scientific evidence of overexploitation became very strong, while others (such as the British and Dutch) abandoned whaling altogether. Since Birnie is not an economist, she no doubt felt that extensive discussion of these points was beyond her competence; she recommends consulting J. N. Tonnessen and A. O. Johnsen's *A History of Modern Whaling* (1982), or Tonnessen's longer *Den Moderne Hvalfangste Historie* (1969) of which the former is an abridgment and partial updating. Yet some mention of industry conditions would help readers who are unable to consult those works to understand IWC proceedings better. The narrative also greatly understates the role of national and transnational environmentalist organizations in shifting the IWC towards conservationist policies by lobbying member governments and encouraging others with no domestic whaling industry to join.

Readers unfamiliar with IWC procedure may wonder why the pressure to compromise often seems so strong. The general concern that failure to agree would leave whalers unregulated by any quota cannot alone explain the sense of urgency conveyed in narratives of individual meetings. Unfor-

tunately, the important fact that IWC meetings never last more than 1 week is not mentioned until page 612. Readers attempting to trace the evolution of individual governments' policies or the conservationist-user balance within the IWC will be frustrated by the partial reporting of votes. No doubt fuller records are available from the IWC itself, but this omission reduces the book's usefulness.

The many whale researchers working far from large legal libraries will find the compilation of documents in volume II extremely useful. It has only one significant omission: the text of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Continuity of the exposition would have been improved by the inclusion of tables or charts summarizing the annual quotas and actual catches over the whole period. These figures are given in the discussion of each meeting, but the wealth of detail in the narrative makes it difficult for readers to keep the trends in mind from one chapter to the next. Systematic tables of the uses to which whale products were put would also be helpful. The scattered mentions provided do not quite add up to the full picture.

The book also suffers from the pernicious effects of the current economics of publishing, specifically the use of author-supplied camera-ready copy with a minimum of editing and proofreading. Like all authors fully immersed in a topic, Birnie would have benefited from editorial advice about reducing repetitiveness, rearranging material and shortening sentences. The proofreading, which permitted such errors as dropping a footnote (p. 17), reversing the meaning by substituting "immature" for "mature" (p. 611) and omitting several cited works from the bibliography (which is more than an inconvenience, given the use of an unadorned "op. cit." for all subsequent references), is no credit to the publisher.

Despite these shortcomings, the book is an essential reference for anyone studying the postwar regulation of whaling. It provides the fullest and most current account of IWC work available. It also supplies material for studying many important questions about the evolution and functioning of international institutions such as the role of specialist advice in decision making, the relative influence of nonstate actors and the politics of competitive coalition building among a sharply divided group of member states.

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Haiyang fa di xin fazhan (New Developments in the Law of the Sea). By Zhao Lihai. Beijing: Beijing University Publishers, 1984. Pp. 466.

The views of the People's Republic of China on the law of the sea have become increasingly important in recent years. Intensive Chinese-foreign cooperative exploration and exploitation of China's seabed and continental shelf resources are under way and will likely increase as the PRC becomes a more active member in the global community. Thus, Zhao Lihai's "New

Developments in the Law of the Sea" is a welcome addition to the literature since it helps define the rights of developers operating in the marine area under China's jurisdiction. Zhao's work is also important because it sheds light on the practice of international law in a developing, socialist state (i.e., China's practice of the law of the sea).

The book is divided into two parts, each of four chapters. Part 1 focuses on the concept of the continental shelf under international law. In chapter 1 Zhao surveys the development of the continental shelf as a legal concept and traces its roots prior to 1945. The 1945 Truman Declaration¹ and the reactions of various states to it are analyzed. Chapter 1 closes with a discussion of the work of the International Law Commission on the shelf.²

Chapter 2 focuses on the outer limits of the continental shelf. Zhao analyzes Articles 1-5 of the 1958 Convention on the Continental Shelf and discusses the 1982 proceedings of the Third United Nations Conference on the Law of the Sea (UNCLOS III) as they pertain to the delineation and outer limits of the continental shelf.

Chapter 3 analyzes a series of disputes related to continental shelf rights. These include the classic cases in the North Sea, the English Channel and the Aegean and Mediterranean Seas. Zhao also analyzes the ongoing dispute among China, Vietnam, Malaysia and the Philippines over rights in the South China Sea.³ Zhao's analysis is comprehensive since it draws from numerous historical sources as well as the relevant principles and practices of international law.

Chapter 4 is devoted to the continental shelf disputes in the East China Sea. Zhao's presentation is helpful in understanding the position of the PRC on this unresolved issue, which has generated voluminous scholarly commentary.⁴

¹ Proclamation No. 2667, 3 C.F.R. 67 (1943-1948). See 13 DEP'T ST. BULL. 485 (1945). For discussion, see Bingham, *The Continental Shelf and the Marginal Belt*, 40 AJIL 173 (1946); L. JUDA, OCEAN SPACE RIGHTS: DEVELOPING U.S. POLICY, chs. 2-3 (1975); Hollick, *U.S. Oceans Policy: The Truman Proclamation*, 17 VA. J. INT'L L. 23 (1976); and Watt, *First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf*, 3 MARINE POL'Y 211 (1979).

² See 1951 ILC Draft, in UN Doc. A/1858, reprinted in 45 AJIL Supp. 103, 139-46 (1951); 1953 ILC Draft, in UN Doc. A/2456, reprinted in 48 AJIL Supp. 1, 27-38 (1954); and 1956 ILC Draft, in UN Doc. A/3159, [1956] 2 Y.B. INT'L LAW COMM'N 264, 295-300.

³ See generally Chiu, *Chinese Attitude toward Continental Shelf and Its Implication on Delimiting Seabed in Southeast Asia*, OCCASIONAL PAPERS/REPRINTS IN CONTEMPORARY ASIAN STUDIES, No. 1 (1977); Chiu, *South China Sea Islands: Implications for Delimiting the Seabed and Future Shipping Routes*, 72 CHINA Q. 742 (1978); Chiu, *Some Problems Concerning the Delimitation of the Maritime Boundary between the Republic of China and the Philippines*, 3 CHINESE Y.B. INT'L L. & AFF. 1 (1983); S. HARRISON, CHINA, OIL AND ASIA: CONFLICTS AHEAD? (1977); Okuhara, *Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf*, 15 JAPANESE ANN. INT'L L. 97 (1971); and relevant sections of Y. J. MA, LEGAL PROBLEMS OF SEABED BOUNDARY DELIMITATION IN THE EAST CHINA SEA (1984); and C. H. PARK, EAST ASIA AND THE LAW OF THE SEA (1984).

⁴ See note 3 *supra*; see also Allen & Mitchell, *The Legal Status of the Continental Shelf of East China Sea*, 51 OR. L. REV. 789 (1972); Chao, *East China Sea: Boundary Problems Relating to the*

Part 2 provides a detailed analysis of UNCLOS III. Chapter 1 examines the scope of national jurisdiction under the 1982 Convention on the Law of the Sea⁵ adopted by UNCLOS III. In that regard, Zhao examines the concepts and juridical status of the territorial sea, exclusive economic zone, continental shelf, passage through straits and islands and archipelagoes under international law.

Chapter 2 examines what is perhaps the most hotly debated issue arising from UNCLOS III—that is, the rights and responsibilities of a state in the sea area beyond the scope of a state's jurisdiction and the "common heritage of mankind." Zhao discusses rights on the high seas and examines the international system and organizations related to marine resource exploration and deep seabed mining.

Chapter 3 examines marine environmental protection and marine science. These subjects are of great concern to the PRC as manifested in its promulgation of the 1983 Marine Environmental Protection Law⁶ and three sets of related regulations.⁷ Zhao discusses the 1982 Convention's system of marine environmental protection and issues in marine science research.

In chapter 4 Zhao concludes with an examination of dispute resolution in law of the sea matters. He examines various aspects of the proposed international tribunal for the law of the sea, including its necessity, availability, organization, jurisdictional reach and the law that such a tribunal might apply. Lastly, Zhao addresses alternative means of dispute resolution in-

Tiao-yu-t'ai Islands, 2 CHINESE Y.B. INT'L L. & AFF. 1 (1982); Cheng, *The Sino-Japanese Dispute over the Tiao-yu-t'ai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L L. 221 (1974); Ma, *The East Asian Seabed Controversy Revisited: Relevance (Or Irrelevance) of the Tiao-yu-t'ai (Senkaku) Islands Territorial Dispute*, 2 CHINESE Y.B. INT'L L. & AFF. 45 (1982); Note, *The East China Sea*, 1973 DUKE L.J. 823; Note, *The 'Distance Plus Joint Development Zone' Formula: A Proposal for the Speedy and Practical Resolution of the East China and Yellow Seas Continental Shelf Oil Controversy*, 7 CORNELL INT'L L.J. 49 (1973); and Oda, *The Delimitation of the Continental Shelf in Southeast Asia and the Far East*, 1 OCEAN MGMT. 327 (1973).

⁵ UN Convention on the Law of the Sea, UN Doc. A/CONF.62/122, reprinted in 21 ILM 1261 (1982).

⁶ The 24th Session of the Standing Committee of the 5th National People's Congress promulgated the law on August 23, 1982, and it came into effect on March 1, 1983. The Chinese and English texts are in COLLECTION OF LAWS AND REGULATIONS OF CHINA CONCERNING FOREIGN ECONOMIC AND TRADE RELATIONS—ZHONGGUO DUIWAI JINGJI MAOYI FAGUI HUIBIAN XI:83 (1983). For commentary, see Silk, *China's Marine Environmental Protection Law: The Dragon Creeping in Murky Waters*, 11 REV. SOCIALIST L. 249 (1985); and J. YANG, ET AL., ZHONGHUA RENMIN GONGHEGUO HAIYANG HUANJING BAOHU FA QIANSHUO (Talks on the Marine Environmental Protection Law of the People's Republic of China) (1983).

⁷ The first two sets are the Regulations of the People's Republic of China on Prevention of Marine Pollution from Vessels and the Regulations of the People's Republic of China on Marine Environmental Protection from Oil Prospecting and Exploitation. They were promulgated by the State Council on December 12, 1983. The Chinese texts are in 1 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO (Gazette of the State Council of the People's Republic of China) (hereinafter cited as GGB) 6 (1984). The State Council more recently, on March 6, 1985, promulgated the Regulations of the People's Republic of China on the Control of Marine Dumping. The Chinese text is in 9 GGB 222 (1985). The English texts are in L. ROSS & M. SILK, ENVIRONMENTAL LAW AND POLICY IN CHINA (1986).

cluding arbitration, mediation and conciliation. Following the last chapter, the book reproduces the full text of the 1982 Convention on the Law of the Sea.

Haiyang fa di xin fazhan has a number of particularly strong, noteworthy points. To begin with, it is the first comprehensive monograph by a Chinese author on the law of the sea.⁸ Second, the author isolates key issues of debate (such as deep seabed mining and transfer of technology) at UNCLOS III and surveys the stands of various countries, making specific reference to China on selected issues. Thus the book offers fresh perspectives on the views of China and other developing nations on a variety of aspects of the law of the sea. Finally, the author's meticulous and extensive annotation and documentation reflects the emerging trend in the PRC toward systematic, thorough and serious legal scholarship.

However, the reader might have hoped for more discussion of China's views and practice. China's position at UNCLOS III tends to get buried in the discussion and there is almost no mention of its actual practice. This is true of some key issues raised in the literature. For example, with regard to the territorial sea, Zhao merely notes in one paragraph that China declared a 12-mile territorial sea in 1958⁹ (p. 89). No mention is made, however, of the fact that the Chinese have yet to publish a map defining the actual baseline of China's territorial sea—which is supposed to follow the straight baseline method.¹⁰ This small shortcoming aside, the book is indeed a welcome and

⁸ Prior to the publication of this book, discussion was limited to articles and sections of books on public international law. See, e.g., Lai Pengchang, *A Brief Introduction to the Third United Nations Conference on the Law of the Sea*, FAXUE (Jurisprudence), No. 4, 1983, at 34; *The Law of the Sea Conference after Nine Hard Years Decides to Pass the Convention on the Law of the Sea*, Renmin Ribao (People's Daily), May 4, 1982, at 7; Lian Chuncheng, *Principles for the Delimitation of the Continental Shelf*, ZHONGGUO GUOJI FA NIANKAN (Chinese Yearbook of International Law) 182 (1983); Lin Xin, *Criminal Jurisdiction in the Law of the Sea*, id. at 208; Lu Shengzu, *Problems Concerning the Law of the Sea*, FAXUE YANJIU (Studies in Law), No. 1, 1981, at 41; Shen Weiliang & Xu Guangjian, *Third United Nations Conference on the Law of the Sea and the Convention on the Law of the Sea*, ZHONGGUO GUOJI FA NIANKAN 401 (1983); Wang Xinshu, *On the Conflict of State Rights in the Enforcement of the Law of the Sea*, FAXUE YANJIU, No. 2, 1983, at 69; Wu Yuni, *Problems Concerning the Continental Shelf and the Law of the Sea*, id., No. 1, 1981, at 53; Zhou Ziya, *New Developments and Their Background in the Law of the Sea*, FAXUE ZAZHI, No. 2, 1982, at 5; Zhou Ziya, *The Status of the Law of the Sea in International Law*, JILIN DAXUE SHEHUI KEXUE XUEBAO (Jilin University Journal of Social Sciences), No. 1, 1982, at 57; and relevant sections of GUOJI FA (International Law) (Li Haopei trans. 1981); LIU FENGMING, XIANDAI GUOJI FA GANGYAO (A General Outline of Contemporary International Law) (1982); WANG TIEYA, GUOJI FA (International Law) (1981); AUBENHAI GUOJI FA (Oppenheim's International Law) (Wang Tieya & Chen Tiqiang trans. 1981); XIANDAI GUOJI FA GAILUN (An Introduction to Contemporary International Law) (Wang Xuan, et al., trans. 1981); WEI JIAJU & SHENG YU, GUOJI FA XIN LINGYU JIANLUN (A General Discussion of the New Realm of International Law) (1984); ZHOU GENGSHENG, GUOJI FA (International Law) (1981); GUOJI GONGFA (Public International Law) (Zhou Ziya ed. 1982); and GUOJI FA JICHU (The Basics of International Law) (Zhu Qiwu, et al., trans. 1982).

⁹ See PEKING REV., No. 28, Sept. 9, 1958, at 21.

¹⁰ See Chiu, *People's Republic of China on the Question of the Territorial Sea*, 1 INT'L TRADE L.J. 29, 50 (1975). The U.S. State Department has issued a calculated version of what it believes

much needed addition to the literature. It should find its way to the bookshelves of all students of China's views on and practice of international law.

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The International Maritime Organisation. Edited by Samir Mankabady. London & Sydney: Croom Helm, 1984. Pp. xix, 376. Index. \$49.50.

From modest beginnings after the Second World War as the Intergovernmental Maritime Consultative Organisation, the International Maritime Organization (IMO) has developed into the central global prescriptive authority for matters affecting, and affected by, the shipping industry. Originally concerned primarily with the safety of ships and navigation, the IMO took an enormous leap into the fields of pollution and liability as these issues moved to the forefront of public concern, providing a unique forum in which shipowners, shippers, insurers and those affected by shipping can meet to help government representatives work out commonly accepted rules.

Some of the same governments that insisted on including the word "consultative" in the organization's title in 1958 were arguing for mandatory compliance by all states with IMO standards by the time of the Third UN Conference on the Law of the Sea. That such modest beginnings, entailing no direct delegation of binding regulatory competence, could evolve so quickly into vast *de facto*, and increasing *de jure*, authority over shipping is at once a tribute to the effectiveness of an organization whose bureaucracy remains small and a lesson for those who believe the power of an organization can be granted, or for that matter constrained, on paper alone. States that find a forum constructive may use it whatever the formal constraints on competence. States that find a forum useless or dangerous may ignore it or devote their energies to circumscribing its activities.

The work of the IMO, in particular the tremendous burst of activity during the 1970s, has resulted in a large number of conventions, codes, recommendations and amendments with which the casual observer may be hard pressed to keep pace. This new book is a welcome first attempt to record and take stock of all those efforts to date. It is at once a handy encyclopedia, a useful review for those interested in marine affairs or environmental protection, an interesting case study for those concerned with international organizations and an instructive compendium of regulatory techniques, including "tacit amendment," of interest to those concerned with effecting responsive changes in international regulations without the delays inherent in the ratification process. Torts aficionados may also find much

the baseline to be. See OFFICE OF THE GEOGRAPHER, U.S. DEPARTMENT OF STATE, INTERNATIONAL BOUNDARY STUDY: LIMITS IN THE SEAS (SER. A), STRAIGHT BASELINES: PEOPLE'S REPUBLIC OF CHINA, No. 12, July 1972, at 2.

to interest them, particularly in the shift to criteria of "risk spreading" and insurability.

What the book may lose in the unevenness and lack of systematic cross-references sometimes characteristic of anthologies, it gains from the presence of cogent and concise essays on different aspects of the IMO's work product. These are written in many cases by perceptive participants in that work, often with ample citations to more lengthy analyses of the matters discussed. One is treated to a variety of different perspectives and tones, from witty British pragmatism to unabashed Canadian nationalism.

A number of the authors note the difficulties posed by the lack of universal ratification of some of the more important conventions produced under IMO auspices,¹ and the lack of formal authority for codes of conduct and recommendations produced by IMO absent incorporation by reference into a treaty. Some authors correctly observe that some rules produced through the IMO nevertheless have a profound effect on planning by the industry and on national regulations. They might also have discussed the effect on national courts seeking an appropriate standard of behavior in civil cases.

What is surprising is that not one author mentions in this context the mandatory incorporation by reference into the 1982 UN Convention on the Law of the Sea of generally accepted international rules, regulations and practices, especially those approved by "the competent international organization."² This is unquestionably intended primarily as a reference to the IMO and its work product where navigation and pollution from ships are concerned.³ Moreover, the Convention ties some prescriptive competences of coastal states in internal waters, archipelagoes, territorial seas, straits and exclusive economic zones to generally accepted international rules, regulations and procedures or approval by "the competent international organization" where regulations regarding navigation and pollution from ships are involved.⁴

This suggests that the law of the sea and maritime law, while hardly divorced from each other in substance, remain the province of two different cultures in many respects. Whatever the historic or bureaucratic reasons for this schism, its survival—like some other remnants of "public law/private law" distinctions—is an unnecessary, misleading and potentially harmful artifact.

BERNARD H. OXMAN
Board of Editors

¹ The United States has been a well-known problem in this regard.

² A similar rule in Article 10 of the 1958 Convention on the High Seas, limited to matters of navigation safety, is nowhere mentioned. Convention on the High Seas, Apr. 29, 1958, Art. 10, 13 UST 2312, TIAS No. 5200, 450 UNTS 82.

³ See UN Convention on the Law of the Sea, Dec. 10, 1982, Arts. 21(4), 39(2), 54, 60(3), 80, 94(5), 210(6), 211(2), 219, 237, 297(1), UN Pub. Sales No. E.83.V.5 (1983).

⁴ *Id.*, Arts. 21(2), 22(3), 41(3, 4), 42(1), 53(8, 9), 54, 211(5, 6), 218(1), 220, 221, 226(1), 228(1), 297(1).

Water Law in Historical Perspective. By Ludwik A. Teclaff. Buffalo: William S. Hein Company, 1985. Pp. xi, 617. Index. \$67.50.

This book, by an author who for close to 25 years has been writing on various aspects of water law, is a wide-ranging study of the regulation of sweet water uses both in municipal law and in international law.

Teclaff's remarks on the fluvial civilizations of antiquity (pp. 1-2 and 565 ff.) are reminiscent of Toynbee's concept of "challenge and response," considered by him the driving force behind the rise of civilizations. The author addresses in chapter XIV the following question: Are we going the way of the fluvial civilizations? His prognosis, while not overly pessimistic, is duly cautionary: "Present-day technology, wedded to the developmental outlook bequeathed by a water-rich European past, may and can at last do what the low energy output of the fluvial civilizations could not do, namely irreversible damage to the environment, not just on a local but on a global scale" (p. 568). In the wider historical perspective, one can only hope that humanity today will be able to rise to this new challenge and devise the proper response to it, just as the ancients successfully rose to the challenge of an expanding population and a growing need for agricultural products.

Part I, on municipal law, covers a representative group of selected countries in six continents belonging to both the developed and the developing groups of nations and to both the capitalist and the socialist blocs. This part of the book (pp. 6-347) is of interest to the international lawyer as background for the evolution of international law on the subject and also because many of the doctrines that inspired rules of international water law evolved first in domestic jurisdictions, particularly those of federal states.

Of more direct interest to the international lawyer is part II (pp. 350-569). Navigation and a case study of the Oder focused on navigation are the subjects of chapters VII and VIII. This is a welcome reminder of the continued importance of fluvial transboundary navigation, at a time when for decades interest has been mainly centered on non-navigational uses of international waters, both in learned bodies (e.g., the International Law Association) and in intergovernmental lawmaking organs (e.g., the International Law Commission of the United Nations). The author's treatment of navigation is continued in chapter IX on the navigation of North American rivers, with special reference to treaties of the United States with its northern and southern neighbors and with nonriparians with regard to the freedom of fluvial navigation.

Like many another international lawyer, Teclaff is an advocate of the drainage basin as the optimum unit for multipurpose international water regulation and management (ch. X). He states that the United Nations and in particular its International Law Commission already accepted the integrated river basin concept as the proper unit for water development (pp. 88, 427 and 526-27). Having gone on record as early as 1966 in favor of the basin approach,¹ the present reviewer can only wish that what the author

¹ INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE HELD AT HELSINKI 447-48 (1966).

says about the UN position were still true. In the context of the work of the International Law Commission in particular, preference for the drainage basin concept was expressed at one time by the then special rapporteur (Schwebel) but has not been endorsed by the Commission. In fact, the term "international watercourse system" used by the rapporteur in 1980 as an alternative to "drainage basin" was not repeated in 1983 by the new rapporteur (Evensen), although his proposals were substantively based on the wider concept. Now, the International Law Commission has still another rapporteur on the topic (McCaffrey) who in his second report² takes note of the continued division of opinion among Commission members, which resulted earlier in discarding the basin concept as "inappropriate" and which is still preventing a consensus on the system concept, considered by its opponents as equivalent to the basin concept. The rapporteur is suggesting, therefore, that this question be left aside for the time being in order not to hamper the Commission's work on the topic.³ It is highly desirable that members of the Commission overcome their mostly political differences and recognize the obvious advantages of the wider concept in connection with the non-navigational development and use of international waters.

Three chapters on environmental protection, pollution of transboundary ground waters and transboundary toxic pollution, studied in the context of the drainage basin concept, complete this work. The one obvious omission is a chapter on the institutional aspects of international water management. The author touches on this issue in connection with certain rivers and particular treaties, but an overall view that would discern the existing pattern, anticipate future trends and propose further developments in the mechanism by which shared water resources are managed would have been welcome. Two alphabetical tables of treaties and cases enhance the value for the researcher of this informative, insightful and timely work.

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Air Worthy: Liber Amicorum Honouring Professor Dr. I. H. Ph. Diederiks-Verschoor.

Edited by J. W. E. Storm van 's Gravesande and A. van der Veen Vonk.

Deventer: Kluwer Law and Taxation Publishers, 1985. Pp. xv, 301.

Dfl.150; £42; \$57.45.

Other than the desire of the writers to honor Professor Diederiks-Verschoor upon her retirement from the University of Utrecht, the only common thread among the articles that make up this collection is that each deals with some aspect of law related to aviation. One is a pithy description of what the author refers to as "neverending and unwinnable" legal battles in the Netherlands between enthusiasts of motorized model airplane racing and opponents who are disturbed by the hazards and enraged by the noise.

² UN Doc. A/CN.4/399 of Mar. 19, 1986.

³ *Id.*, paras. 62 and 63.

Of somewhat broader interest is a thoughtful piece by the director of McGill's Air and Space Law Institute, Nicolas Mateesco Matte, deploring the trend toward militarization of outer space and evaluating proposals for further UN action to confine activities in outer space to peaceful purposes. The article by E. R. C. van Bogaert deals with remote sensing, the process by which satellites record photographically and by other means details of the earth's surface and subsurface. Both authors make the point that the international regulation of activities in outer space is inhibited not only by the competition between the superpowers, but also by the common unwillingness of states that have established space activities to concede a voice in the control of such matters to states that have not.

Bin Cheng, the author of the first and still the only comprehensive treatise on international air law, has contributed a critique of Article 3 *bis* of the Chicago Convention. That article is the amendment to the Convention adopted in response to the Soviet destruction of KAL Flight 007; it reads in part: "The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered." One of Professor Cheng's criticisms is that Article 3 *bis* as written inhibits the use of force by a state not only against foreign civil aircraft but against aircraft of its own nationality as well, including airplanes used for criminal purposes. If Cheng is right, this could be an obstacle to ratification in some states, but it seems unlikely that his interpretation will gain wide acceptance. He, himself, does little to support it when he contemptuously dismisses *Filartiga v. Pena-Irala* as "the rather bizarre United States case." That decision held that it was a violation of the law of nations for a state to torture its own citizens.¹ If the case is relevant—and in citing it, Cheng suggests that it is—it would seem improvident for him to disparage this prop to his argument.

The book contains a workmanlike summary of the U.S. program of airline "deregulation," together with a description of steps recently taken by Canada to initiate its own version of deregulation, and a forecast of similar trends in Europe (by P. P. C. Haanappel). It is plain that European countries, in varying degrees, feel impelled to follow the U.S. lead toward some form of deregulation, but there is also evident a desire to avoid the airline bankruptcies, disruptions of service and extreme inequalities of fare levels on different routes that have characterized the U.S. experience. In another article, R. D. van Dam, a government lawyer in the Netherlands, suggests that, paradoxical as it sounds, selective reregulation may be the only way to assure the success of the deregulation program. He would so structure the licenses granted to airlines as to confine the larger carriers to the main intercontinental and transborder routes, and these would be subject to regulation more or less as at present for reasons arising out of the "international bilateral environment." But the remaining areas and routes would be open for relatively easy entry by companies with smaller equipment and resources,

¹ 630 F.2d 876 (2d Cir. 1980).

and among these carriers "market" conditions could prevail without the risk of monopolization by the larger established airlines. The author makes no claim to be ploughing entirely new ground; he cites pertinent analogies in the United States and elsewhere. His approach is practical rather than flamboyant as befits a responsible government official seeking solutions rather than airing theories.

Other articles in the *Liber Amicorum*, while not without merit, deal with matters of concern to a limited readership or with propositions that have been previously expounded quite fully. These include a discussion of constitutional and other provisions of German law leading to the conclusion that there is a general presumption in favor of the competence of civil rather than military authorities in aviation matters where there is an interface between the two (by K.-H. Böckstiegel); and an article on the phasing out of Eurocontrol, an organization that has been controlling the routing of high-altitude flights over a considerable portion of Western Europe (by A. E. du Perron). In this article, as well as in the one by Federico Videla Escalada, there are useful discussions of the liability of air traffic control operators. Also discussed are the history of aircraft accident investigation in the Netherlands (Storm van 's Gravesande); the authority of the aircraft commander (Jacob W. F. Sundberg); rights to carry traffic internationally pursuant to the Chicago Convention and bilateral agreements (H. A. Wassenbergh); the need for further intergovernmental agreement on standardization of signals between aircraft, particularly in the course of interceptions (Aart A. van Wijk); and an outline of matters to be dealt with in a modernized aviation code for Indonesia (Priyatna Abdurrasyid).

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Aviation Laws and Treaties of Bulgaria, the People's Republic of China, the CSSR, the German Democratic Republic, Hungary, the Democratic People's Republic of Korea, Laos, Poland, Romania, the USSR, Yugoslavia and the Republic of Vietnam. 6 vols. By J. L. Kneifel. Munich, 1985. Pp. 3926. DM 290. Books may be ordered from the author (Oertlinweg 8, D-8000 Munich 90, Federal Republic of Germany).

With an introduction by Dr. Kneifel, this is a collection of bilateral air transport agreements concluded by governments of the Soviet bloc countries and of the People's Republic of China and Yugoslavia. The title is therefore somewhat misleading: the six volumes of Kneifel's edition (3,926 pages!) do not include national aviation legislation of these countries, only the texts of the agreements.

Little is generally known about the air transport policies or civil aviation laws and regulations of Soviet bloc countries. Neither is there any noticeable interest in research in this area, one probable reason being the smaller size of international air transport markets in these countries compared to the North Atlantic or some other areas. Nevertheless, air services to and from

the Soviet bloc countries form an integral part of the world air transport network, and developments in air policies or aviation laws in these countries should not be ignored.

The source of documentation for Kneifel was the archives of the International Civil Aviation Organization (ICAO). According to Article 81 of the ICAO Charter, the 1944 Chicago Convention, all aeronautical agreements between the ICAO states and any other states have to be registered "forthwith" with the ICAO Council. As practitioners know, unfortunately only too well, this obligation is quite often implemented in a manner that leaves much to be desired, in terms of both timeliness and, particularly, completeness of filing. Suffice it to say that it is the unfiled confidential documents often accompanying the agreement, rather than the agreement itself, which portray the real substance of the commercial deal struck (routes and traffic rights exchange, restrictions thereon, etc.).

As is well known, bilateral air transport agreements, which at present form the legal foundation for the operation of international scheduled air services, usually contain in addition to the exchange of routes and traffic rights a great number of economic, administrative and legal provisions which, in their totality, represent the desired level of harmonization of national policies, laws and regulations. In this context the user of Kneifel's material might have expected that the air transport agreements concluded among the Soviet bloc countries would be somewhat different from other agreements, reflecting perhaps more directly, without compromises, the air transport policies of these countries. Such an expectation would, however, be disappointed: there are some glaring gaps in the list of agreements with states of the same, Soviet sphere group. For example, only one such agreement is included in the case of Bulgaria, and two in the case of Romania and Hungary; the list of agreements of this group registered by other states and reproduced by Kneifel is also incomplete. In some cases, there may be some doubt that the texts reproduced are indeed the agreements currently in force (e.g., the 1946 agreement between Czechoslovakia (CSSR) and the USSR or the 1948 CSSR-Yugoslavia agreement). The documentation available in Kneifel's collection can thus provide only very limited and unreliable information about the type of mutual relations in air transport between the countries involved. The reader is left wondering about what may be called specific or typical in these relations.

Judging by agreements such as that between the USSR and Laos or the USSR and the German Democratic Republic (GDR), they tend not to contain very many specific provisions. Among those that would stand out to anyone making a comparison with equivalent Western documents would be a number of technical provisions, which Western practice omits in bilateral agreements in recognition of satisfactory multilateral solutions under the Chicago Convention, the more significant role played by airlines in such regulatory matters as tariffs, capacity and routing, and the settlement of disputes through direct consultations with the exclusion of arbitration. There are some small surprises such as the transfer of airline earnings in "hard currencies" in the USSR-Laos agreement or the explicit obligation imposed on airlines in the USSR-

GDR agreement to direct traffic between the two territories (3d and 4th freedom traffic) exclusively to services of the two countries. Agreements are not uniform and there is great variety in the approaches taken by individual countries: in some cases, arbitration is accepted as a method for settlement of disputes; there may even be multiple designation of airlines (CSSR-Senegal agreement), currency conversion and transfer to headquarters of excess airline revenues (U.S.-Yugoslavia agreement) and other relatively liberal provisions.

This does not alter the general impression of protectionism which is also evident, of course, in agreements with countries outside the Soviet sphere and is to some extent applicable to Yugoslavia and the People's Republic of China as well. In the agreement between Yugoslavia and Romania, traffic between respective territories is reserved exclusively to national airlines and it is stated that undesirable competition between those airlines should be avoided. In the USSR-Burma agreement, it is declared that the airlines of both countries should have the same minimum level for tariffs.

Kneifel's introduction suffers from some defects in structure and terminology. The latter deficiency could be attributed to translation. The former diminishes the usefulness of the book for quick reference: e.g., the section on "Taxes" deals not only with income taxation but also with customs; the section on "Dissolution of Treaties" also deals with amendments and with unilateral measures without dissolution of the treaty, while observations relating to the qualification of airlines, statistics and the ICAO are each dispersed among several sections of the introduction.

Kneifel should nevertheless be commended for this herculean effort. In many instances, the raw material he has collected could indeed prove useful to the "air transport authorities and airlines," as postulated in the preface, if not to other possible readers as well.

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Polish Yearbook of International Law, Vol. XIII, 1984. Wrocław: Zakład Narodowy im. Ossolińskich Wydawnictwo, 1985. Pp. 260. Zł. 420.

This volume contains 10 articles, a report on the Supreme Court decisions in civil law cases involving conflicts of law (Tomaszewski) and one on the awards of the Court of Arbitration (Wisniewski). It also ends, as preceding volumes do, with a list of international treaties and agreements, bilateral and multilateral, concluded by Poland (1982-1983) and a bibliography of books and articles published in Poland during the same period.

The *Yearbook* opens with an important article on Hugo Grotius, his general role in the development of the science of international law, his epoch and, most interestingly, his Polish connections. Professor Bierzanek points out that his *De Jure Belli ac Pacis* followed an earlier work by Gentile (Professor Ehrlich of Lwów demonstrated this conclusively in the 1930s) and that he was not as original as he was claimed to be. However, Grotius's other activities

justify his position in history. All his life he worked for peace between nations. As Swedish minister in Paris, he endeavored to smooth Swedish relations with Poland where, as in Sweden, a Vasa was king. Although in his younger days Grotius was embroiled in factional religious conflict in Holland, in his later days he tended to deplore religious conflicts, the cause of so many wars in Europe.

Professor Simonides continues his work on the law of the sea in an article on *Delimitations of Maritime Areas*. Among the causes that justify a departure from the equidistance principle, he lists security reasons. That thesis was first advanced in Soviet writings during UNCLOS III and raised again by the Soviet Union in negotiations with Norway in the eighties.

Morawiecki and DeFiumel describe diplomatic "logrolling," trade-offs and package deals as unavoidable in negotiations when unanimity is to be achieved. It is a must in relations between socialist countries (COMECON) and was a part of the negotiating process at UNCLOS III.

The next two articles on international economic law (Gilas) and the most-favored-nation clause (Nowakowski) are related to the proliferation of communities, groupings, understandings, preferential arrangements and the efforts of socialist countries to penetrate trade barriers that communities establish.

Four articles on different themes follow. Czubinski writes felicitously on the Polish consular law which incorporated the Vienna Convention of 1963 into the Polish legal system, while Gluchowski contributes an article on Poland's double taxation conventions, including two multilateral treaties of the Socialist Commonwealth on the subject. His article includes a short, but revealing, description of the Polish tax system.

Finally come two articles; one is on the extradition of Nazi war criminals, a topic of recent interest (Szpak), while Sosniak contributes another article on conflicts of law (*ordre public*). Altogether, an interesting collection of studies.

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The Canadian Yearbook of International Law. Volume XXII, 1984. Edited by C. B. Bourne. Vancouver: University of British Columbia Press, 1985. Pp. 471. Index. \$36.50.

This latest volume of the *Yearbook* offers readers another collection of interesting and provocative articles treating legal issues relevant not only to particular Canadian perspectives but to the international legal community as a whole.

The first article, by L. C. Green, examines the law of armed conflict and the enforcement of international criminal law. Professor Green reminds us that, despite some attempts during the League of Nations period and subsequently, an international criminal court has never been created. With no international means of enforcing the sometimes problematically defined guidelines of international criminal law, jurisdiction and enforcement devolve

upon national authorities—with all of the attendant political implications. The article reviews conventions and customary practices in an attempt to assess the extent to which international criminal law has meaning as well as enforcement prospects.

A lengthy discussion by Claude Emanuelli of sovereign immunity and international custom seeks to study the conditions of application of international custom in the area of sovereign immunity, to determine whether a restrictive or absolute interpretation of immunity has become part of customary international law and to speculate on the future development of the principle of sovereign immunity. Even though the International Law Commission has, since 1978, undertaken a study of sovereign immunity, basic issues concerning the principle remain unresolved.

The remaining four articles probe various aspects of sea law. Susan Boyd offers a very interesting comparative study of the legal status of Arctic sea ice. The past and present practice of three Arctic states—Canada, the United States and the Soviet Union—serves as a basis for discussing the international legal status of sea ice. The works of jurists from each state are also examined and compared. Finally, the author offers a proposal for the international legal classification of sea ice based upon her comparative study, traditional sea law and the physical properties and uses of various types of sea ice. The article deserves attention, not only on its own merits, but also as an example of a larger process in which we confront our frontiers in a shrinking world.

Separate articles by M. L. Jewett and L. L. Herman treat various legal aspects of the continental shelf under Canadian and international law. A dispute between the federal Government of Canada and Newfoundland over ownership of offshore mineral rights, decided by the Supreme Court of Canada in 1984, serves as a vehicle for examining both the specific case as well as broader international law. Both articles also refer to a similar case in 1967 involving British Columbia.

The focus of the Jewett article is on the development of international law in relation to the continental shelf, with an assessment of rights that might have been accorded by international law in 1949, the date of union of Newfoundland with Canada. The author reviews state practice, the work of the International Law Commission leading up to the 1958 Geneva Conference on the Law of the Sea, legal decisions and the writings of jurists. Part II of the article, which studies the practice of the United Kingdom especially as it relates to the Newfoundland discussion, will appear in the next *Yearbook*.

L. L. Herman examines in detail the judgments of both the Supreme Court of Canada and the Newfoundland Court of Appeal in the matter of the Newfoundland offshore mineral rights references. The article demonstrates that the doctrine of incorporation played a significant role in the reasoning of both courts (especially the Supreme Court of Canada) as they recognized the relevance of public international law concepts to the disposition of internal legal disputes. The author concludes with a challenge to Canadian lawyers to be sensitive to future areas of possible incorporation and to expand their legal horizons beyond a narrow focus upon purely national legal precepts to include an awareness of public international law.

The final article, by Robert S. Lefebvre, reviews the work of the 1984 Diplomatic Conference convened by the International Maritime Organization (IMO) to consider liability and compensation questions regarding the transport of noxious and hazardous substances by sea as well as the possibility of oil pollution damage. The article focuses on the implications of the exclusive economic zone for geographical jurisdiction limits under current liability conventions.

The Notes and Comments section of the *Yearbook* includes a very good discussion of the *Gulf of Maine* case, noteworthy not only as an effort by Canada and the United States to determine a maritime boundary, but as the first use of the Chamber procedure in the history of the International Court of Justice. There are also two discussions of the Korean civilian airliner incident in which KAL Flight 007 was shot down near Sakhalin Island by Soviet military aircraft, causing the loss of 269 lives. One note focuses on the use of force against civil aircraft; the other looks at the Canadian claim for victims of the ill-fated flight.

Finally, the *Yearbook* concludes with the regular review of Canadian practice and cases in international law and with a selection of book reviews.

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South African Yearbook of International Law. Volume 9, 1983. Pretoria: VerLoren van Themaat Centre for International Law, University of South Africa. Pp. 291. Index.

This volume of the *Yearbook* contains four substantive articles in English and four briefer articles in the Notes and Comments section. These eight articles are the subject of this review. In addition, the *Yearbook* contains summaries of South African and foreign judicial decisions, as well as texts of UN decisions on South Africa adopted in 1983. There are also sections containing edited texts of official South African parliamentary statements and speeches on foreign policy, the titles of bilateral and multilateral treaties entered into by the Republic in 1983, the titles of South African legal periodicals and book reviews.

The first article is entitled *Hugo Grotius 10th April 1583–28th August 1645*, by P. van Warmelo. In sum, it is little more than a vacuous plea by the author for a more just world order—one that would more closely reflect the Grotian vision of an international order “founded on justice, liberty, tolerance, equality and fraternity” (p. 11).

The article begins with a brief descriptive review of the rise to prominence of the young Grotius and a restatement of some of the already well-known theoretical and substantive contributions of Grotius to international law through his three principal oeuvres: *De Jure Belli ac Pacis*, *Mare Liberum* and *De Jure Praedae*. The article then briefly sketches some pertinent dynamics of the contemporary international order that ironically demonstrate the failings of the Grotian vision despite its purported comprehensiveness and

universalism. Thus, van Warmelo rightly notes that the Grotian international order, based as narrowly as it was on the Christian states of Western Europe, has had to expand to accommodate the aspirations of the peoples of the Americas, Asia and Africa (p. 9). He also implies that the Grotian distinction between *bellum justum* and *bellum injustum* has proved to be unworkable in light of not only the experience of the two world wars, but also the existence of modern means of warfare and continuing superpower rivalries (pp. 8–9). Rather than seeing the above as paradoxes or ironies of the Grotian vision in the face of contemporary realities, van Warmelo prefers to end with the vain hope that Grotius's "superior spirit will prevail at some later stage in the future and will make the world and international relationships more civilised" (p. 11).

The next article is much more tightly focused and organized. It is entitled *Enlistment of Aliens for Military Service via Automatic Naturalisation and Succession to Treaties in the Republic of South Africa*, by A. E. A. M. Thomashausen. The author discusses the international legal implications of the South African Citizenship Amendment Act No. 43 of 1984.

The Act is aimed at South Africa's substantial number of white resident aliens. Its purpose is to conscript such aliens—who are not South African citizens but who have acquired the status of permanent resident—into the armed forces of South Africa. The Act proceeds to achieve this purpose by providing for the compulsory and automatic acquisition of South African citizenship by certain categories and age groups of such aliens. The only way in which such an alien can avoid military service is by declaring that he does not wish to become a South African citizen. However, by making such a declaration, the alien forfeits his status as a permanent resident.

Thomashausen begins with a review of those general principles of international law (including the law of war) that have a bearing on the right of a state to exercise jurisdiction, both personal and territorial. After asserting that the classical distinction between personal and territorial sovereignty has become "inadequate" (p. 34), he submits that contemporary state practice reflects a movement away from personal jurisdiction—based on a strict connection with nationality—in favor of jurisdiction based on *de facto* or "effective links" between a person and the state seeking to assert jurisdiction, the approach established by the *Nottebohm* case. Thomashausen also cites pertinent norms of modern humanitarian law (e.g., the distinction between combatants and civilians, regardless of nationality) in support of his argument as to the erosion of the traditional basis of jurisdiction founded on strict notions of nationality.

Having thus broadened the basis of state jurisdiction over individuals—particularly aliens—Thomashausen finds one functional limitation to that jurisdiction, namely, that "compulsory military service of aliens who are nationals of a belligerent country is definitely prohibited" (p. 36). Apart from this narrowly framed prohibition, Thomashausen finds no prohibitory rules of general as well as customary international law that might restrict a state's ability to induct aliens compulsorily into its armed forces.

The author perceptively observes, however, that the absence of an established prohibitory state customary practice does not necessarily imply an affirmative right *in favor of* compulsory military service. Indeed, it may be because of this that the South African legislation gives the alien the choice of refusing South African citizenship. However, the "choice" is really an illusory one since, as the author observes, a rejection of citizenship would lead to the cancellation of an alien's permanent resident status, and presumably, his deportation.

A full and more candid review by the author of the legality of compulsory citizenship (on pain of deportation), as distinct from compulsory military service, would have been valuable. Unfortunately, he is content to treat the imposition of citizenship as synonymous with compulsory military service and since he finds that the latter is not prohibited, the act of conferring compulsory citizenship itself appears to be implicitly permitted. Even if the purpose of the Act (making military service compulsory for aliens) is taken to be legitimate, it would have been fruitful to discuss whether the means chosen to achieve that purpose (compulsory citizenship) was appropriate or rational. Such a discussion would have been particularly helpful in view of the fact that citizenship carries with it a host of rights and duties extending far beyond the duty of military service.

The author also examines treaty law and finds a similar absence of restriction on the power of states to require compulsory military service from aliens. Such restrictions as do exist Thomashausen attributes to regional and, more particularly, bilateral negotiations between states whereby one state agrees to "exempt" the nationals of another state or states from compulsory military service. He cites a number of friendship and commerce treaties concluded in the late 19th century between South Africa and several European powers, where such exemptions were granted by South Africa. The legal situation obtaining from these, however, remains unclear since they were concluded prior to the formation of the Union of South Africa in 1909 and raise unresolved questions of state succession (pp. 39-42).

The article then turns to an examination of the citizenship law in light of case law and the writings of publicists (pp. 45-49). After concluding that case law is not helpful, primarily because of the relative scarcity of court decisions on the subject, Thomashausen reviews the writings of scholars. Although their opinions are divided, he finds a preponderance of modern international law scholars to be in favor of state jurisdiction on the basis of "effective links," including permanent residence. The diminished importance of nationality as the link for allegiance in modern state practice and the opinion of contemporary writers, together with the developing treaty law, lead the author to conclude that there is no general prohibitive rule of international law against compulsory military service of an alien—unless he is asked to serve against a belligerent state of which he is a national.

Finally, the author examines the implications of dual nationality stemming from the South African citizenship law since the operative effect of the law will be to create large numbers of dual nationals who would become subject to compulsory South African military service (p. 49). Indeed, the author

correctly observes, in such instances of dual nationality individuals may be called upon to serve more than once in the armed forces of two or more states; furthermore, this could happen even if these states whose nationalities the individual possesses are at war. In such cases, the prohibition against subjecting an individual alien to military service against a state of which he is a national would be displaced because the plural national is not an alien in any of the countries whose nationality he possesses.

The author is content to uphold the South African law in this context as well, on the ground that there is no rule of international law prohibiting a state from legislating on citizenship matters in a way that will lead to the creation of dual nationality. Here again the article may be criticized for its passive tone, symbolized by its retreat behind technicalities. The citizenship law could surely have been analyzed, as mentioned above, in terms of its relationship with military service, using the means-ends analysis, as well as in terms of the legality of compulsory citizenship *itself*. It could also have been analyzed in view of the fact that citizenship (normally a matter of individual choice, and indeed, a human right under customary international law) carries with it legal effects that transcend the narrow or more immediate goal of the South African law, namely, military service. One of these effects is the imposition of dual nationality in a way that contravenes a rule that is, in the author's own opinion, a definite prohibition: i.e., the rule against subjecting an individual to military service against a belligerent state of which he is a national. Such a discussion, accompanied by a balancing of competing priorities of international law, the rights of the individual under general or customary international law, and an appropriate measure of interplay between technical exposition and policy-oriented argumentation, would have considerably strengthened an already useful article.

Next is an article originally written in German by Peter Haberle and translated into English by D. H. van Wyk. It is entitled *The Problem of Public Welfare from a Legal Point of View*. In essence, the article is a continental (particularly German) variant of the school of "sociological jurisprudence" associated in the United States with the writings of Roscoe Pound. As with Pound's approach, Haberle's approach postulates a value-consensus in society which, in turn, is seen to permeate all aspects of social and legal ordering. In place of Pound's mysterious "jural postulates," Haberle substitutes an equally nebulous concept of "public welfare" from which he detects "impulses" that "emanate" into the political, legislative, administrative and judicial levels of "the western democratic constitutional state" (pp. 54, 59-60, 70, 75-76).

The high level of abstraction of the article, together with the fact that it was perhaps poorly written or poorly translated (or both), leaves the reader unsatisfied as to the theoretical and substantive content of "public welfare," particularly since it is extolled as a comprehensive and, indeed, *unifying* social and legal concept. At the heart of the concept appears to be an undefined formula for evaluating and balancing competing interests. There is further the recognition that this is necessary because, as various interests compete for official recognition, they may produce discord and tension; tension be-

tween what public welfare as an "ideal postulate" would require and what is in reality possible (pp. 66, 76). In its former (i.e., ideal) context "it serves as a politico-ethical appeal to rulers and ruled alike to sacrifice the selfish pursuit of their own interests in favour of the general interests" (p. 66). In its latter context the tension is symbolized by conflict between public welfare and individual rights, between public welfare and official secrecy and by "distortions" of the concept. Such distortions occur when "ideology-prone" meanings are given to public welfare. These distortions would then need to be countermanded by what appear to be essentially legal constructs such as demands for basic rights/human dignity, protection of privacy, calls for justice and procedural due process, demands for pluralistic openness of official conduct and separation of powers (a term that is not explained) (pp. 66, 76).

Equally puzzling is the attempt to locate a positivistic foundation for the concept of public welfare in terms of the "structure" of the German Constitution (p. 71), which is identified as the "basic" legal order for state and society and as containing "material guidelines" and "procedural measures" for the "implementation and control" of public welfare (pp. 54-58, 76). However, even though public welfare is asserted to be "a basic legal concept" (p. 77), the jurist is exhorted to go beyond the constitutional structures, and to search for its essence in the history and culture of the people (p. 71), rather in the tradition of the historical jurisprudence of Haberle's fellow German jurist, Carl von Savigny.

The next article, by George N. Barrie, is entitled *Exit Mare Liberum—The 1982 Law of the Sea Convention*. The article is a largely descriptive piece (with only two rather unhelpful footnotes). It gives the background to UNCLOS III, and an at best sketchy overview of the negotiations and compromises that led to the final text of the UN Law of the Sea Convention. It ends with a summary of some of the principal provisions of the Convention.

Barrie begins by outlining how the regime established almost 30 years ago by the 1958 Geneva Conventions on the Law of the Sea became inadequate in light of political and technological developments (pp. 78-80), creating pressures for a new international effort to codify a comprehensive law of the sea. He then outlines the salient negotiating positions of the main state groupings, with their respective or common interests. The first was the Group of Five (composed of the United Kingdom, France, Japan, the United States and the USSR). Their principal common interests are described as navigation, commerce, seabed mining and marketing. The main grouping in opposition to the Group of Five during the 9-year effort to negotiate the LOS Convention was the Group of 77, composed largely of Third World countries whose main concern was over the economic exploitation of the world's ocean resources (particularly seabed mining) and the distribution of the wealth derived therefrom. The next group identified is the Land-locked and Geographically Disadvantaged States, a group of 53 states whose principal interest was in ensuring their access to fishing grounds that might otherwise fall within fishing zones of coastal states. Two other groups (the

Group of 22 and the Group of 29) were concerned primarily with different methods of drawing boundaries between the ocean zones adjoining individual countries.

Barrie does not undertake what would have been the elaborate but useful task of detailing the give-and-take in the 9-year-old history of the negotiations between the above-mentioned groups. Rather, he outlines the main area of discord that almost led to the break-up of the conference, namely, regulation of the seabed. The disagreements, which have since been well publicized due to the refusal of the United States, the United Kingdom and West Germany to sign the treaty, involved disputes over ownership of the technology of seabed mining and ownership and disposition of the resources recovered through such mining, with the United States advocating very limited powers to any international agency involved in decision making in the disputed areas, and with the developing countries advocating that the agency have such wide powers that it would in effect control all aspects of seabed mining, including the marketing and pricing of metals mined. This eventually led to the establishment of the International Sea-Bed Authority and its subsidiary, the Enterprise, the former having the power to regulate and manage the production of minerals and metals, the latter being the organ through which the Authority would carry out its functions. In the end, however, these compromises proved to be unacceptable to the three countries mentioned above.

Finally, Barrie provides a descriptive summary (largely without analysis) of the Convention's provisions on the delimitation of the territorial sea and innocent passage therein, on transit passage, the exclusive economic zone, the continental shelf, exploitation of the living and nonliving resources of the seas, the International Sea-Bed Authority and the dispute settlement mechanisms. Such a cursory statement of a few selected provisions of the Convention may have been justifiable in the immediate aftermath of the signing of the Convention on the ground that they represented the principal advances on the "old" law of the sea. Its usefulness today remains questionable not only because of its superficiality but also because of the burgeoning literature on the subject matter in the 4 years since the signing of the Convention that has superseded it. Indeed, the other half of the article—on the political background of the negotiations—also suffers from lack of depth. Instead of restating the already well-known divisions between North and South, coastal and inland states, the author could, by delving more deeply into the *travaux préparatoires*, have presented a much more structured account of how the political, economic, strategic and, indeed, ideological dynamics of the negotiations influenced the content of the particular compromises reached, with appropriate footnote material for further reference.

The Notes and Comments section of the *Yearbook* begins with two comments on the South African Constitution of 1983. The first, by Gretchen Carpenter, is entitled *The Republic of South Africa Constitution Act 110 of 1983* (p. 96).

The Act is seen by the existing white minority Government of South

Africa as giving a "new dispensation" to certain segments of South Africa's nonwhite population, namely, that of having limited participation in the South African Parliament. This participation is to occur in a strictly segregated fashion (as explained below), and the Act is itself founded on the premise that the basic infrastructure of apartheid, including, for example, the Population Registration Act of 1950, which divides and classifies the population of South Africa into three main and seven subsidiary groups on the basis of race, will remain unchanged. The Act is also based on two further premises, namely, that the new Constitution would not threaten "the vital interests of the present dominant group, whose leaders will have to make final decisions about constitutional change,"¹ and that while certain nonwhite segments of the population would be represented in Parliament, they would not include any from the country's black population. Carpenter avoids critical comment on these three fundamental premises of the 1983 Constitution Act, and instead focuses, somewhat unsystematically, on the mechanics of operating the new Constitution.

The first operative principle of the Constitution is its distinction between "general affairs" and "own affairs." Matters that "specially or differentially affect a population group" essentially defined by race fall in the category of "own affairs." All other matters are "general affairs." Whether a matter falls under one or the other category is a decision committed by the Constitution (secs. 16 and 17(1)) to the executive branch for final determination and is not subject to judicial review. Indeed, there is generally no power of judicial review of legislation passed by the South African Parliament, except in the amendment of certain "entrenched provisions" of the Constitution (pp. 103-04).

The Constitution establishes a "presidential" system, with the State President as the Chief Executive acting in consultation with his 18 Ministers (who are also members of his Cabinet) in all "general" matters. In the area of "own affairs" the State President acts on the advice of the appropriate Ministers' Council, whose chairman functions as "a kind of ethnic Prime Minister" (p. 102).

The Constitution establishes a tricameral racially segregated legislature composed of the House of Assembly (with 290 white members), the House of Representatives (with 85 members of a racial grouping classified as "coloured") and the House of Delegates (with 45 members from the Indian population). Legislation affecting the particular (i.e., "own") affairs of a population group is adopted by the house whose affairs are concerned, whereas all three houses must approve "general" legislation.² In the event of a conflict among the three chambers, the legislation could be referred by the State President to his President's Council³ (an advisory body not

¹ First Report of the Constitutional Committee of the President's Council PC3/1982 59 quoted in the book under review at p. 106.

² The Act contains a Schedule defining "own affairs." Any matter falling outside this category is by definition "general."

³ The President's Council is made up of 20 members nominated by the House of Assembly, 10 by the House of Representatives, 5 by the House of Delegates and 25 by the State President.

forming part of the legislature) for final resolution. One of the criticisms leveled against such a procedure is that "persons who are not the directly elected representatives of the electorate will have the final say in legislative disputes" (p. 101). The only hope of avoiding or at least minimizing such conflict would be the joint committees from the three chambers (authorized by the Constitution) which are to thrash out and reach compromises on legislative issues prior to voting in the three houses. In the event of a failure to reach a compromise, the legislation may be abandoned; but if referred to the President's Council the preponderance of voting power is clearly with white officials—since only 15 members out of 60 are from the nonwhite community—thus again ensuring that power remains firmly in the hands of the white electorate.

The next article, by Dawid van Wyk, entitled *The New Constitution: Some Unresolved Questions*, is a bolder (if still somewhat muted) attempt at a critical evaluation of the Constitution. On the election of State President, van Wyk notes that it would always be a "forgone conclusion that the candidate who is nominated for the office by the caucus of the strongest party in the (White) house of assembly becomes the State President." He thus comments that it "does not reflect democratic values or foundations in any conceivable sense of the word" (p. 105). Even though he examines alternatives, they do not answer his concern for a democratic election of the State President in any fundamental sense.

However, his above-quoted comment applies to the Constitution as a whole, insofar as it precludes a one-man, one-vote electoral system, thereby disenfranchising some 15 million people. Without discussing this fundamental question, van Wyk expresses a "hope" that there may be "more acceptable constitutional involvement of the Blacks" in the future (p. 108). Van Wyk also has some reservations about the existing system of racial classification in South Africa possibly being too "rigid" (pp. 109–10) and appears to advocate a less coercive system of racial classification. Finally, he notes the absence of a bill of rights in the Constitution, and concludes with a plea for the inclusion of one.

Next is a brief note by Christa van der Schiff on the reception and influence of international humanitarian law upon domestic South African law. The subject of the note is the case of *S v. Sagarius*.⁴ In this case the court had to decide whether the death penalty should be imposed on the accused who had been convicted under South Africa's Terrorism Act of 1967. The accused were members of the South West Africa People's Organization (SWAPO) operating in Namibia and, at the time of their capture, wore SWAPO military uniforms.

The court noted that although South Africa was not a party to some of the principal treaties on international humanitarian law, namely, Protocol I to the Geneva Convention of 1949 and the 1977 Protocol I Additional to the Geneva Conventions of 1949, the case had certain international law aspects. These were:

⁴ [1983] 1 S.A. 833 (SWA), noted in the book under review at p. 112; see also *id.* at 132.

- (i) that the International Court of Justice and other authoritative organs of the UN had branded the South African presence in South West Africa as illegal;
- (ii) that this attitude was shared by a large part of the international community;
- (iii) that the accused regarded their actions as part of a just conflict with strong local and foreign support;
- (iv) that there is a tendency in Public International Law to accord prisoner-of-war status to captives that openly participate in a characteristic uniform in an armed conflict against a colonial, racist or foreign regime;
- (v) that, although the South African legislator [*sic*] had qualified the offences as a particularly serious misconduct, this appeared not to be the view of the major part of the community in South West Africa, as well as of the international community, according to the undisputed evidence given in Court;
- (vi) that the accused were of an impressionable age, were probably being used by others for political gain and had no previous criminal record;
- (vii) that, in the case of one of the accused, it appeared from his testimony that he became disillusioned when he experienced the reality of SWAPO training;
- (viii) that, as the Court acknowledged, the lives of all three of the accused would have been endangered, had they tried to leave their training camps;
- (ix) that, as the defence argued, heavy penalties would not discourage other SWAPO activists from carrying out their operations, so that particularly heavy sentences would not serve a preventative purpose [pp. 113-14, footnotes omitted].

In view of these factors the court decided against imposing the death penalty authorized under the Terrorism Act.

The note contains some reflections and questions (which are not answered by the author) as to whether nonbinding international law principles could have been legitimately considered as mitigating factors in this case, particularly since the court did not discuss the more traditional mitigating factors that have generally influenced court decisions on the death penalty (p. 115). In addition, the author suggests that some of the mitigating factors recognized by the court and quoted above (particularly (v) and (vii)) were of questionable validity. The author concludes by citing South African case law suggesting that even to the extent that customary international law is a part of South African law, the former cannot supersede existing statutory law. Such a bald, indeed controversial, stand, no matter how amply supported by domestic case law, would surely need citation to corroborative international practice or authoritative statement for it to be a credible argument.

The final note in the Notes and Comments section is entitled *Nkomati: The Accord and its Background*, by M. Beukes. The subject of the note is the nonaggression pact (known as the Nkomati Accord) signed by South Africa and Mozambique in March 1984.

After raising two essentially extraneous issues (regarding (1) recognition of Mozambique by South Africa upon the former's independence; and (2) succession to treaties by Mozambique to treaties concluded by Portugal—the colonial power—on behalf of Mozambique) Beukes presents an oversimplistic account of the political background to the accord. His account treats the accord as a purely bilateral affair, when it is quite clear that it must be viewed in its wider regional context. Such a contextual approach would require an analysis of the regional as well as international dimensions of the conflict in southern Africa, including the important issue of Namibian independence, and the pressures (economic, political and military) motivating South Africa to negotiate similar accords with Botswana, Swaziland and Angola—the latter raising the issue of Cuban troops and U.S. concerns, as well as U.S. attempts to broker deals between South Africa and its neighbors.⁵ The only helpful portion of the note is its three-page summary (pp. 123–25) of the 11 articles of the Nkomati Accord.

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BRIEFER NOTICES

Middle East Legal Systems. By S. H. Amin. (Glasgow: Royston Limited, 1985. Pp. xv, 434. Index. £30.)

Islamic Law in the Contemporary World: Introduction, Glossary and Bibliography. By Sayed Hassan Amin. (Glasgow: Royston Limited, 1985. Pp. ix, 190. Index. £12; \$15.) These two books, targeted at Western audiences, are useful handbooks for international lawyers who deal with the Middle East. In the first book, the author tries to provide a general framework of the legal systems of 15 countries: Afghanistan, Bahrain, Iran, Iraq, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Sudan, Syria, Turkey, United Arab Emirates and North and South Yemen. A convenient bibliography accompanying each chapter will satisfy those who wish to scratch below the surface.

The second book, a possible companion to the first one, is a more up-to-date depiction of general facts about the subject. A glossary and a bibliography make up half of the pages of the author's survey. While the books will disappoint those readers who want an analytical treatment of why the law is as it is, they are, as descriptive volumes, a contribution to their field, essential to the international lawyer's library.

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⁵ For further detail, see Dore, *Self-Determination of Namibia and the United Nations: Paradigm of a Paradox*, 27 HARV. INT'L L.J. 159 (1986).

Main Points in Decisions of the World Bank Administrative Tribunal. Vol. II (1983-85). By C. F. Amerasinghe and D. Bellinger. (Washington: International Bank for Reconstruction and Development, 1985. Pp. ii, 33.)

Index to Decisions of the World Bank Administrative Tribunal (2d ed.). By C. F. Amerasinghe and D. Bellinger. (Washington: International Bank for Reconstruction and Development, 1985. Pp. vii, 32.)

Index of Decisions of International Administrative Tribunals (2d ed.). By C. F. Amerasinghe and D. Bellinger. (Washington: International Bank for Reconstruction and Development, 1985. Pp. vi, 149.) The "main points" series guides the reader to the issues of significance in the decisions of the World Bank Administrative Tribunal since its creation in 1980. References to decisions and orders of the Tribunal are also facilitated by an index to its decisions by the same authors, now in its second edition. Their index to decisions of international administrative tribunals enables a researcher to find relevant awards of 12 tribunals including the ILO, the League, the OAS and various European bodies.

DETLEV VAGTS

NEW SERIAL PUBLICATIONS

(Under this heading, we review new serial publications so as to introduce them to our readership. We do not anticipate reviewing further issues of these publications.)

Amity International. Vol. 1, No. 1 (1985). Edited by Vitis Muntarbhorn. (Bangkok: Faculty of Law, Chulalongkorn University for the International Law Association of Thailand. Pp. 82. Subscription, \$30.) This journal began with a June 1985 inaugural issue reporting developments in Thailand relating to international law as well as articles of general international law significance.

Revue de Droit des Affaires Internationales. Nos. 1-4, 1985. Editor in Chief, Henry Lesguillons. (Paris: Librairie Générale de Droit et de Jurisprudence, 1985. F. 1,200.) This journal addresses topics of interest to international business lawyers, including commerce, taxation and finance. For example, issue number 4 of 1985 contains a series of articles on exculpatory clauses in international contracts. Articles are published in English or French with summaries in the other language.

East European Reporter. Nos. 1-4, 1985-1986. (London: East European Cultural Foundation. Subscription, \$8.50 plus \$1 postage.) This journal reflects the opinions of individual authors in Czechoslovakia, Hungary and Poland. It reports extensively about human rights issues and the fate of dissidents in those states.

International Accounting and Reporting Issues: 1984 Review. Published under the auspices of the United Nations Centre on Transnational Corporations. (New York: United Nations, 1985. Pp. xi, 122.) In 1982 the UN Economic and Social Council established an Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting. This is a second report by the group on important current disclosure problems and how they are dealt with by transnational corporations and by the governmental and professional bodies that set standards for disclosure. The possibilities of international harmonization are discussed.

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International Law—General

- James, Alan. *Sovereign Statehood: The Basis of International Society*. London, Boston, Sydney: Allen & Unwin, 1986. Pp. xiii, 288. Index. \$37.95, cloth; \$14.95, paper.
- Murphy, Cornelius F., Jr. *The Search for World Order: A Study of Thought and Action*. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985. Pp. xiii, 192. Index. Dfl.115; \$43; £31.95.

International Economic Law & Relations

- Baptista, Luiz O., and Pascal Durand-Barthez. *Les Associations d'Entreprises (Joint Ventures) dans le commerce international*. Paris: FEDUCI—Librairie Générale de Droit et de Jurisprudence, 1986. Pp. iv, 285. Index. F.300.
- Bronckers, M. C. E. J. *Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law*. Deventer: Kluwer Law and Taxation Publishers; The Hague: T.M.C. Asser Instituut, 1985. Pp. xxvii, 277. Index. Dfl.165; £45.75; \$70.
- Bulajić, Milan. *Principles of International Development Law*. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers; Belgrade: Exportpress, 1986. Pp. 403. Dfl.175; \$76.50; £48.50.
- Cheng, Chia-Jui (ed.). *Basic Documents on International Trade Law*. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1986. Pp. xii, 753. Index. Cloth: Dfl.350; \$142; £96.95. Paper: Dfl.75; \$25.
- Hall, R. Duane. *Overseas Acquisitions and Mergers: Combining for Profits Abroad*. New York, Westport, London: Praeger Publishers, 1986. Pp. ix, 185. Index. \$32.95.
- Legislation Controlling the International Beef and Veal Trade*. Legislative Study No. 36. Prepared by the Animal, Plant and Food Legislation Section of the Food and Agriculture Organization of the United Nations, Rome, 1985. Pp. xi, 131.
- McCreary, Don R. *Japanese-U.S. Business Negotiations: A Cross-Cultural Study*. New York, Westport and London: Praeger Publishers, 1986. Pp. viii, 121. Index. \$35.
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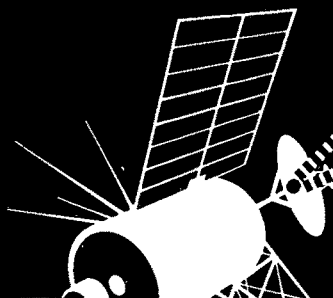
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